BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of Comcast Phone of California, LLC (U-5698-C) and its Related Entities (Collectively "Comcast") to Determine Whether Comcast Violated the Laws, Rules, and Regulations of this State in the Unauthorized Disclosure and Publication of Comcast Subscribers' Unlisted Names, Telephone Numbers, and Addresses.	Investigation 13-10-003 (Filed October 3, 2013)

COMCAST PHONE OF CALIFORNIA, LLC (U 5698 C) AND RELATED ENTITIES POST-HEARING REPLY BRIEF

[PUBLIC VERSION]

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EXECUTIVE SUMMARY

The inadvertent publication of the listing information of XFINITY Voice customers who had asked Comcast to exclude their information from public directories was a deeply regrettable mistake that Comcast has fully acknowledged; which it self-reported; and for which it has taken full responsibility, providing extensive redress to affected customers, and devoting enormous resources to ensure improvement of its procedures. That said, however, Comcast's position is that as regrettable an error as the release of information was, it was not a violation of law. The Safety Enforcement Division ("SED") advances a scattershot series of arguments to try to prove otherwise, but these are wrong on both the facts and the law. For the reasons set forth below, SED's claims should be dismissed and this proceeding closed.

1. Disregarding the controlling standard of review—which requires the Presiding Officer's findings of fact to be based on substantial evidence in the record, and bars reliance on "speculation, conjecture, imagination, or guesswork"[1]—SED spins out one conspiracy theory after another in an effort to suggest gaps and inconsistencies in Comcast's explanation of how it inadvertently released certain of its customers' non-published listings. As demonstrated below (*see* Section III, *infra*), however, these "gaps" and "inconsistencies" are nonexistent—and reflect, at best, a misunderstanding or mischaracterization of the evidence, or speculation and conjecture. SED's assertions, for example, reflect a fundamental misunderstanding about the Process Error as well as speculation about the duration and extent of the release of non-published listings. And with no basis in fact, SED impugns the significant, good faith efforts that Comcast made to notify Affected Customers and provide them with effective and meaningful redress.

[1] Decision No. ("D.") 11-06-003, Att. A (D.11-05-049) *mimeo* at 35, n. 27.

Equally misguided is SED's effort to portray this proceeding as being about the supposed "predations of the data industry."[2] Simply put, this case has nothing to do with the data-brokering industry, data aggregators, or "big data."[3] And while SED is free to invite the California Public Utilities Commission ("Commission") to open a rulemaking proceeding into the data brokering industry—SED's focus on those practices here merely underscores the extent to which it has strayed from its mandate to investigate the actual issues presented by this case—an expansion of scope that violates the express terms of the OII. Comcast is not a data broker, and Comcast's directory listing distribution agent (Neustar) has not used Comcast's directory listing information for any data brokering purposes.

2. SED's brief suffers not only from myriad of factual errors—and in many cases, outright distortions of the record—but from the legal infirmities detailed in Comcast's Opening Brief.[4] At the outset, this entire proceeding is barred by Public Utilities ("PU") Code Section 710, which prohibits the Commission from asserting "regulatory jurisdiction or control over [VoIP] services."[5] SED's attempts to evade this prohibition uniformly miss the mark. First, because Section 710(a) on its face precludes the Commission from regulating Voice Over Internet Protocol ("VoIP") and IP-enabled *services*—without regard to the regulatory classification of the *entity* that provides those services—SED's reliance on the alleged role of Comcast Phone of California, LLC (U 5698 C) ("Comcast Phone") (the relevant Comcast regulated entity here) is unavailing. Nor is SED's argument advanced by invoking theories of

[2] Amended Opening Brief of the Safety and Enforcement Division, filed November 7, 2014, ("SED Amended Opening Brief") at iii.
[3] *Id.* at 112.
[4] *See* Comcast Phone of California, LLC (U 5698 C) and Related Entities Post-Hearing Opening Brief, filed November 4, 2014("Opening Brief") or ("Comcast Opening Brief") at *passim.*
[5] Public Utilities ("PU") Code § 710(a). All "Section" citations and references refer to the PU Code unless indicated otherwise.

alter ego and accessory liability in an attempt to pin liability on Comcast IP Phone II, LLC ("Comcast IP") (an unregulated provider of VoIP services). In any event, as shown below, those theories of liability fail for lack of evidence.

Comcast has already demonstrated the shortcomings of SED's argument that Section 710's prohibition on VoIP regulation is no obstacle because this proceeding supposedly focuses on the wholesale *interconnection service* that Comcast Phone provides to Comcast IP (and not on the residential *VoIP service* at issue here). "As Comcast has shown, if SED were correct that the Commission would avoid Section 710 simply by purporting to regulate the interconnection element of VoIP services, Section 710 would be meaningless since VoIP services *always* require interconnection with a regulated "telephone corporation" to the Public Switch Telephone Network ("PSTN"). Nothing in SED's brief changes that analysis.

However, for the first time in this proceeding, SED's brief advances the theory that the Commission may exercise jurisdiction—notwithstanding Section 710—over certain aspects of the XFINITY Voice VoIP offerings, including the end-user charges for its associated non-published listings and disclosures Comcast made to customers about its VoIP service. This goes even further than the erroneous interconnection theory that the Presiding Officer previously accepted in ruling on Comcast's motion to dismiss, and SED's attempt to further expand the Commission's jurisdiction in violation of Section 710 should be rejected. Similarly SED's theory—that the provisions of law on which it relies are laws "of general applicability" not subject to the prohibition on VoIP regulation—would nullify Section 710 and lead to the absurd conclusion that the Commission can apply the *entire PU Code* against providers of VoIP service notwithstanding Section 710.

3. In addition to the jurisdictional obstacles to its claims, imposing liability for conduct involving the provision of a never-before-regulated VoIP service would violate the PU Code and Comcast's due process rights. The Commission has never declared VoIP services to be a regulated telephone service. Quite the opposite, it has *declined* to take any regulatory action with respect to VoIP services—and it did so even before Section 710 was enacted. To do so for the first time in a complaint proceeding would be arbitrary and unfair.

4. Even apart from those threshold issues, each of SED's legal claims fails on the merits.

a. In addition to ignoring the fact that the Commission has no authority to enforce the right to privacy in Article I of the California Constitution, SED fails to even allege (much less establish) a critical element of its constitutional privacy claim—that the Release was so serious as to "constitute an egregious breach of the social norms underlying the privacy right."[6] On that ground alone, the claim should be dismissed.

b. SED's theory that Comcast violated PU Code Section 2891 by disclosing "demographic information" likewise fails because that provision, on its face, does *not* apply to information provided by telephone corporations for directories or directory assistance.

c. SED's theories that Comcast violated Section 2891.1 are flawed on multiple levels. *First*, Section 2891.1 was intended to restrict a telephone corporation from selling or licensing its customers' non-published listings to *third parties*—in particular, telemarketers. To the extent SED asserts that Comcast violated Section 2891.1 by licensing listings to Neustar, that claim fails because Neustar was Comcast's own *agent*; it was not a

[6] *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 37, 39-40 (1994).

publisher or an independent *third party* to whom Comcast sold or licensed the listings. And Comcast cannot violate Section 2891.1 by providing listings to itself.

Second, to the extent SED contends that Comcast violated Section 2891.1 by allowing Neustar to further license listings to third parties, that claim also fails because the record establishes that Neustar did *not* license or sell any non-published telephone numbers (the type of listings information that Section 2891.1 targets) to any such parties. Even where it received (properly flagged) non-published listings from Comcast, Neustar did not include the non-published telephone *number* in its files to third parties.

Third, as explained in Comcast's post-hearing Opening Brief, there was no Section 2891.1 violation because that provision prohibits only a telephone corporation's sale or licensing of *its own* non-published telephone numbers. Here, however, the listings were not those of *Comcast Phone* (the only "telephone corporation" here and which is not the service provider to the end user customers); rather, they were *Comcast IP*'s listings—those of an unregulated VoIP provider that provides a service over which the Commission lacks jurisdiction. Relatedly, under the contract that governs Comcast Phone's provision of local interconnection service to Comcast IP, monitoring the accuracy of non-published listings is not part of the interconnection service that Comcast Phone provides; rather, this function is the sole responsibility of Comcast IP.

d. SED's theories that Comcast violated PU Code Section 451 fare no better. To begin, all of those theories founder because Section 451 targets acts by "public utilities," and SED has not shown that Comcast Phone (the only regulated public utility) engaged in any of the conduct which it alleges violates Section 451. SED's claims that Comcast violated Section 451 by charging customers for non-published service that was not rendered and by having allegedly inadequate disclosures regarding the service also fail on jurisdictional grounds because Section

710 clearly bars the Commission from regulating the end-user rates or disclosures for VoIP services. These claims also fail on the merits because, under established Commission precedent, inadvertent billing errors do not violate Section 451, and the record demonstrates that Comcast's customer disclosures about its non-published services are reasonable and consistent with industry standards.

Nor did the Release of the non-published listings themselves violate Section 451's "just and reasonable" service requirement, as the Commission's *Cox* decision (extensively discussed in Comcast's Opening Brief) demonstrates. Finally because Comcast's procedures concerning third parties' "downstream use" of listings were reasonable—indeed, they were consistent with widespread industry practices and applicable laws—SED cannot establish any Section 451 violations predicated on those practices.

e. Perhaps recognizing the fundamental flaws in its principal theories of liability (under Sections 2891.1 and 451), SED supplements these claims with a grab-bag of newly asserted violations—none of which was ever articulated in the Commission's Order Instituting Investigation or the Presiding Officer's Scoping Memo. These new claims are not properly before the Presiding Officer and should be dismissed. In any event, they are uniformly meritless. SED's reliance on the Commission's General Order ("GO") 168 is puzzling, as the Commission has clearly instructed that GO 168 is no more than a statement of legislative intent and shall *not* "form the basis for a finding of liability by a court or the Commission."[7] SED's reliance on the Business & Professions Code ("B&P Code") is equally perplexing: SED merely asserts that Comcast "may have" violated its provisions; it concedes that the Commission does not even have the authority to enforce this part of the B&P Code; and it articulates no plausible

[7] D.06-03-013, *mimeo* at 45.

theory of a violation of the B&P Code in any event. SED's contention that Comcast violated "the spirit" of California's "Shine the Light" law is no more plausible. Indeed, SED tacitly concedes that it cannot establish any violation of the terms of that statute.

Finally, largely relying on unsupported conspiracy theories and unjustified *ad hominem* attacks on Comcast witnesses and counsel, SED's assertions of Commission Rule 1.1 violations are baseless. Comcast personnel and its counsel inside and outside the company diligently investigated the facts and circumstances surrounding the Release and, in good faith, provided discovery responses to SED based on the best information then available. Consistent with its continuing discovery obligations, Comcast promptly corrected responses that it subsequently learned were mistaken—and it did so within days of obtaining new, updated information. Commission precedent dictates that this sort of prompt and candid self-reporting is not a Rule 1.1 violation.

5. Even if SED and Intervenors, The Utility Reform Network ("TURN") and The Greenlining Institute ("Greenlining"), could establish liability, their proposed penalties—***$43.9 million*** for SED[8] and ***$35.68 million***, with ***additional restitution of $20 million***, for the Intervenors[9]—are grossly disproportionate to the alleged offenses, and violate PU Code Section 2107, the Commission's precedent, penalty guidelines, and the United States and California Constitutions. To make matters worse, the parties *also* call for onerous and unnecessary injunctive relief, which far exceeds the Commission's authority and could impose tens of millions of dollars of additional costs on Comcast. The Presiding Officer should reject these

[8] SED Amended Opening Brief at 117.
[9] Joint Opening Post-Hearing Brief of TURN and Greenlining on Comcast's Publishing of Unpublished and Unlisted Names, Telephone Numbers, and Addresses of Comcast Subscribers, filed November 4, 2014 ("Intervenors Opening Brief") at 30-32.

invitations to impose punitive measures for an inadvertent mistake, as they are contrary to law, contrary to the evidence, and contrary to any legitimate policy objective.

I. INTRODUCTION[10]

Pursuant to Rule 13.11 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure and the revised schedule granted by Administrative Law Judge ("ALJ") Burcham,[11] Comcast Phone and Related Entities named in the above-captioned Order Instituting Investigation ("OII") (collectively, "Comcast") respectfully submit this Reply Brief to SED's Amended Opening Brief and the Intervenors' Brief. Comcast's Reply Brief primarily responds to the allegations and arguments set forth in SED's Amended Opening Brief. While the Intervenors' Opening Brief is largely comprised of unfounded speculation and unsupported conclusions, to the extent it raises arguments not otherwise addressed by SED, Comcast responds to those herein as well.

II. BACKGROUND

Comcast's Opening Brief cited substantial and unrefuted record evidence establishing how the underlying error occurred (the "Process Error"); where the inadvertently released non-published listings[12] of approximately 74,000 residential XFINITY Voice subscribers in California (the "Release") were distributed (and for how long); the efforts that Comcast made to

[10] Filed herewith as Appendix 1 is a side-by-side comparison of the issue headings approved by ALJ Burcham and the issue headings Comcast has used in its brief. Comcast's appendix also includes previously admitted Exh. Com 103/103C (Donato), Att. C, one tariff Comcast has concurrently moved for the Commission to take official notice of, a Confidential Comparison of remedies provided in Cox and remedies provided by Comcast, and the Comcast hearing transcript errata. Comcast reserves the right to supplement its errata due to the time constraints imposed by the reply brief schedule.

[11] *See* November 7, 2014, ALJ Burcham E-mail Ruling granting Comcast' request for a two business day extension of time to file reply brief from November 21, 2014 to November 25, 2014.

[12] As noted at n. 1 of Comcast's Opening Brief, for convenience, it will use the term "non-published" to refer to both non-published and non-listed numbers.

identify, notify and provide redress to customers affected by the Process Error and Release ("Affected Customers"); and how the company has invested in improving its systems on a going–forward basis.[13] Comcast also explained its efforts to promptly notify the Commission and Attorney General's ("AG") office about the Release and to cooperate with the Commission in its investigation.

Undeterred by the actual facts in the record, SED makes arguments that are based in sheer conjecture and unfounded allegations. These include that the Release may have started earlier and lasted longer than the evidence shows; that non-published listings may have been distributed to more parties than Comcast has identified; that the listings may have been used for data-brokering purposes; that many former Affected Customers may not have received notice of the Release; and that Comcast should have discovered the error sooner based on supposed "warning signs." While Mr. Christo, SED's chief witness, supports his speculation about alleged wrong-doing by Comcast with the theory that "anything is possible,"[14] there is no record evidence that supports his allegations, as he admitted several times at the hearing.[15]

What the evidence *does* show is that:

- The Release was caused by a then-unidentified flaw in the process that Comcast used for identifying non-published listings—the Process Error—the effects of which were exacerbated by a system-wide change to California account numbers in October and December 2009.[16]

- Unaware of the flaw in its process, Comcast unknowingly provided files that did not accurately reflect the non-published status of certain customer listings to two entities: (1) Frontier Communications, Inc. ("Frontier") and (2) Neustar, Inc. ("Neustar"), in its capacity as Comcast's listing distribution agent; Neustar then

[13] Comcast Opening Brief at *passim*.
[14] Tr. SED (Christo) at 220:1.
[15] Tr. SED (Christo) at 226:13-15; 234:23-26; 246:17-26 (Oct. 2, 2014).
[16] Comcast Opening Brief at 11-12; Comcast Reply Brief at § III.A.

distributed the listings to two entities (for use): a national directory assistance provider (kgb, Inc. ("kgb")) and Comcast's affiliate Plaxo, Inc. ("Plaxo").[17]

- The duration of the Release was limited to the July 2010-December 2012 period (with an exception for distribution to Plaxo, which retained the listings for a few months into 2013).[18]

- The Release was inadvertent. Comcast did not and had no reason to foresee that the Release would occur; it took reasonable precautions to protect customer information; and it did not benefit from the Release in any way.[19]

- Although Comcast received isolated calls from some customers about publication of their non-published listings before it discovered the Process Error, the number of those calls was extremely small in proportion to the overall volume of customer care calls Comcast received during the relevant period. The number of trouble tickets that Comcast care representatives opened for these calls was likewise extremely small. These isolated customer contacts failed to alert Comcast to the existence of an underlying systemic problem.[20]

- The Commission received some complaints from Comcast customers about publication of their non-published listings—but did not even forward those complaints to Comcast. In contending that Comcast should have discovered the Release earlier, SED overlooks the fact that Comcast might have done so had the Commission alerted Comcast to the complaints ***it*** received from Affected Customers. The Commission's explanation for why it did not forward Comcast these complaints—because it lacks jurisdiction over Comcast's VoIP service offerings—reflects the Commission's recognition that this investigation is improper and a violation of due process.[21]

- Comcast takes its duty to safeguard its customers' information very seriously. Neither Comcast nor its agent Neustar distribute non-published telephone numbers to third parties. Moreover, Comcast's directory listing contracts all contain restrictions that prohibit licensees from using Comcast information for purposes other than providing directories or directory assistance services. The record evidence shows conclusively that Comcast listings have not been used for data-brokering purposes.[22]

[17] Comcast Opening Brief at 13-15; Comcast Reply Brief at § III.C.
[18] Comcast Opening Brief at 13 and Appendix 2; Comcast Reply Brief at § III.C.
[19] Comcast Opening Brief at 11-12, 16.
[20] Comcast Opening Brief at 15-16; Comcast Reply Brief at §§ III.D., IV.D.3.
[21] Comcast Opening Brief at 27-28.
[22] Comcast Opening Brief at 23; Comcast Reply brief at § III.E.

- The process that Comcast used to notify Affected Customers was reasonable and comparable to methods expressly approved by the Commission and the state to notify customers that money is owed to them.[23]

- Comcast has provided extensive redress to Affected Customers, including not only full refunds for fees incurred for non-published service, but also free services worth hundreds of dollars and special redress (such as payment for security systems) for customers with safety concerns. [24]

- Comcast has implemented processes designed to prevent such errors from occurring again, including implementing measures to validate the accuracy of the listing data, improving procedures for investigating complaints, and commissioning an internal audit team to conduct a comprehensive and ongoing assessment of Comcast's practices and procedures.[25]

SED rounds out its baseless arguments with the claim that Comcast did not cooperate with the Commission's investigation and has tried to hide behind a "veil of secrecy."[26] Those allegations are patently untrue. As the record unequivocally shows, it was Comcast that voluntarily brought the Release to the Commission's attention. And Comcast has devoted considerable efforts to responding to SED's ever-expanding inquiry—an inquiry SED now admits was intended to reach issues well beyond the Release itself and the Scoping Memo, and provide the groundwork for a Commission rulemaking proceeding concerning the data-brokering industry.[27]

Determined to discredit Comcast's self-reporting of the Release, SED and the Intervenors speculate that Comcast purposely delayed in reporting the Process Error until "8 days after SB 1161 [*i.e.*, PU Code Section 710] … became effective."[28] Nothing in the record supports the

[23] Comcast Opening Brief at 20-21, Comcast Reply Brief at § III.F.
[24] Comcast Opening Brief at 21-22, 42-43, Comcast Reply Brief at § III.F.
[25] Comcast Opening Brief at 23-25, Comcast Reply Brief at § III.F.
[26] SED Amended Opening Brief at 10-12.
[27] SED Amended Opening Brief at ii-iii.
[28] Intervenors' Opening Brief at 6; *see also* SED Amended Opening Brief at 21 ("Comcast reported the breach to the Commission less than 8 days after SB 1161…became effective").

proposition that Comcast's voluntary disclosure to the Commission was delayed at all – or that it was tied in any way to the passage of SB 1161. Nor does the theory even make sense. The record evidence demonstrates that Comcast discovered the Release *after* SB 1161/Section 710 had been signed into law.[29]

In sum, the facts here support Comcast's positions and dismissal of the case. In contrast, SED's claims rest on speculation, mischaracterizations of the record, and unfair innuendos, and the Presiding Officer should reject this misuse of this proceeding. When all of that underbrush is cleared away, only one conclusion is possible: The Release of non-published listings was a regrettable error, but it did not violate the law. That is the conclusion the Commission should reach.

III. FACTS

A. COMCAST PRESENTED COGENT AND CONSISTENT EVIDENCE SUPPORTING HOW THE PROCESS ERROR OCCURRED

SED's skepticism about Comcast's explanation of the Process Error results from what seems to be a basic misunderstanding of the evidence—not any inconsistencies or gaps in Comcast's explanation of the events that led to the inadvertent Release. As recounted in its Opening Brief, and further below, Comcast's substantial and credible record evidence supports Comcast's explanation of how the Process Error occurred. SED has cited no probative evidence to the contrary. Rather, SED invites the Presiding Officer to commit the reversible error of rejecting the evidence and instead rule based speculation about what "may have" happened.[30]

[29] *See* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1161.
[30] *See* Section IV.C, *supra*, for a discussion of the applicable evidentiary standard.

As Comcast has explained, the Process Error refers to an anomaly in the process that Comcast used for identifying non-published listings.[31] The anomaly can be traced to the Phone Order Item or "POI" Table that was a subject of substantial testimony. As its name suggests, the POI Table contains a record of customer orders for phone service, including any requests for non-published service. The system engineers who were tasked with developing a process for extracting directory listings files that could be provided to independent telephone companies ("ICOs") for their phone books identified the POI Table as the source of the non-published listing data they needed, and Comcast later used this same process to submit listings to Neustar.[32]

What these engineers did not realize, however, was that in the rare event that Comcast initiated changes to customers' account numbers,[33] the POI Table would maintain the order history under the old account number, not the customers' new account numbers.[34] Thus, when the POI Table was queried for a customer's *new* account number and telephone number under these circumstances, the table provided no indication of a customer's non-published status if that status was requested using the customer's *old* account number.[35] Because Comcast assigned new account numbers to all customers in California due to a statewide market merger in late 2009,[36] the Process Error affected California customers to a much greater extent than customers in other

[31] Comcast Opening Brief at 11 -12; Exh. Com 103/103C (Donato) at 12-13.
[32] As Comcast has explained, the POI Table extraction process was originally developed to transmit listings to rural, independent telephone companies (the "ICOs") who did not receive listings through the ILEC service order process, which is how Frontier received the non-published listings. That process subsequently adopted to transmit listings to Neustar. *See* Tr. Comcast (Donato) at 461:1-9 (Oct. 3, 2014).
[33] As Comcast explained, account number changes initiated by a customer were not subject to the same problem, because a customer's request for a new account number would result in termination of the old account and new services being ordered/associated with the new account. Comcast Opening Brief at 12, n. 46.
[34] Comcast Opening Brief at 12, citing Exh. Com 103/103C (Donato) at 11-13.
[35] Comcast Opening Brief at 12, citing Exh. Com 103/103C (Donato) at 11-13.
[36] Comcast Opening Brief at 11 -12; Exh. Com 103/103C (Donato) at 12-13.

states where account number changes occurred on a more limited basis.[37] Notwithstanding Comcast's clear explanation of its process and how the Release occurred, SED continues to mischaracterize the processes Comcast used and argues that this should cast doubt on Comcast's explanation.[38]

1. SED's Mischaracterization of the POI and PAS Tables

SED has an evolving and continuing misunderstanding of the POI and PAS Tables. SED originally claimed that that the POI Table must have been empty, and an empty table should have been a warning sign.[39] As Comcast explained at the hearings, and SED appears to now concede, the POI table was not empty.[40] Now, without any citation to the record, SED erroneously assumes the table had billing information or all information except non-published status.[41] Again, SED does not understand. The POI Table is a history of orders for phone services as they occurred at the time the customer initiated the transaction. As Comcast has explained repeatedly, the table contained the non-published status of any customer who ordered non-published service after December 2009.[42] As for SED's supposition that the POI Table had billing information or was used for billing, it was not, as SED's witness (Mr. Christo) admitted on cross-examination.[43]

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[37] Other states were affected to a much smaller degree due to isolated cases of Comcast's assignment of new account numbers to customers in cases of market realignments (for taxing purposes) or smaller market mergers. *See* Comcast Opening Brief at 12.
[38] SED Amended Opening Brief at 23.
[39] *See* Exh. SED 6/6C (Christo) at 4-5 (alleging it was empty).
[40] Tr. (Donato) at 394:28-395:3 (October 2, 2014); see also Tr. (Christo) at 242:8-12 (October 2, 2104); see also SED Amended Opening Brief at 23 ("At hearing, Comcast was at great pains to point out that the POI Table was not empty.)
[41] SED Amended Opening Brief at 23.
[42] Comcast Opening Brief at 12.
[43] Tr. SED (SED/Christo) at 206:19-25 (October 2, 2014):

SED also expresses skepticism about why one table (the POI table) was impacted by the Process Error and the other (the PAS Table) was not, asserting that "[n]o explanation is given" for why the Process Error did not impact the PAS Table.[44] SED's question again underscores its fundamental misunderstanding of the issue. The Process Error did not affect the POI or the PAS Tables. Instead, the use of the POI Table along with Comcast initiated account number changes *resulted in* the Process Error.

As testimony from Ms. Donato that SED cites in its own brief establishes, the PAS Table reflected the current account number and all current features associated with a customer's telephone number "regardless of whether those services and features were originally ordered under a different account number."[45] That is why the use of the PAS Table, as opposed to the POI Table, corrected the Process Error.

2. SED Mischaracterizes the Impact of the Process Error

SED also mischaracterizes the evidence Comcast cited to show the impact and duration of the Process Error. However, there is substantial evidence to support Comcast's statements regarding the duration of the Release, the extent of the dissemination of non-published numbers, and why the Process Error affected some (but not all) non-published customers.

First, SED suggests the fact that the Release only affected a portion of the non-published customers in California "*may* contradict" Comcast's story that there was one Process Error.[46]

Q. Do you understand there's the billing table and then extracted data to another table called the POI Table? And the billing table was used for billing and the POI Table was used to create the directory listing feed.

A. Yes.

[44] SED Amended Opening Brief at 24.

[45] SED Amended Opening Brief at 24.

[46] SED Amended Opening Brief at 25 (emphasis added).

SED further asserts that "[f]or Comcast's story to be true, as SED understands it, *all* California non-published customers should have been affected by the breach."[47]

SED's understanding is, simply put, wrong. Customers who requested non-published service for their listings *after* the system-wide change of account numbers were properly withheld from publication because they were not affected by the Process Error. As Comcast has explained, the Process Error affected California accounts where requests for non-published service were made *before* the system wide account number change (which occurred in two phases in October and December 2009). Starting in late 2009 (after the system-wide account number change in California), new customers were initiating service, existing customers were terminating service, and customers made new requests for non-published status. The POI Table accurately reflected the non-published status of all of these customers, and these customer listings were properly withheld from publication (either in the online directory Ecolisting.com or elsewhere).[48] Ms. Donato explained this dynamic process as follows:

> As existing customers made changes to their listing status and/or as new customers activated XFINITY Voice services (and requested non-published status), the POI Table then reflected the XFINITY Voice work orders for the new account numbers. For this reason, any customers who requested non-published status *concurrent with or after the system-wide account number change* would have had their listings correctly identified as non-published.[49]

This fact—rather than SED's speculation about multiple errors—accounts for the fact that there were **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** total non-published

[47] SED Amended Opening Brief at 25.
[48] Exh. Com 103/103C (Donato) at 28-29 (reviewing reconciliation process that confirmed listings were properly withheld).
[49] Exh. Com 103/103C (Donato) at 12 (emphasis added).

customers in California as of February 2013, but only 74,000 customers affected by the Process Error between July 2010 and December 2012.[50]

SED also claims that the fact that some customers outside California were impacted casts doubt on the Process Error. SED asserts "the fact finder has no basis" on which "to assume ... that the same sort of number reassignment, combined with the same sort of data table query, was used in other states."[51] Fortunately, the Presiding Officer does not need to "assume" anything. At hearing, Ms. Donato explained that approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** customer listings[52] in other states were affected by similar account number changes:

> Q. [Mr. Christo] says that he doesn't understand how account changes in California caused customers in other states to be affected. Do you see that?
>
> A. Yes.
>
> Q. So how were customers in other states affected by the Process Error?
>
> A. So it's true they weren't affected by the account number changes in California, but there were similar account number changes -- not to the extent that happened in California because every California customer at the end of 2009 got a new account number. But similarly, there were other instances at different times when that happened in other states. So it was a similar explanation, just to a different magnitude and timing.
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> ****

[50] Exh. Com 103/103C (Donato) at 3 (noting 74,000 Affected Customers). As the record reflect the Affected Customers were the ones who had non-published status prior to late 2009 and maintained that status for some or all of the time period impacted by the Process Error. Exh. Com 103/103C (Donato) at 12-13

[51] SED Amended Opening Brief at 25.

[52] *See also* Tr. Comcast (Donato) at 394:24-396:6 (explaining that there were 87,000 total listings impacted, 78,000 of which were in California.) Note that the number of impacted listings (78,000 in California) is more that the total number of Affected Customers (74,000) because some customers have more than one telephone number *See* Exh. Com 103/103C (Donato) at 18 (noting some customers had more than one phone number); Tr. Comcast (Donato) 395:11-27 (explaining difference between Affected Customers and affected listings).

> Q. How would that affect customers in other states?
>
> A. The same way it did in California. So if there had been a change to account numbers, not at the customer's request, for instance, due to a move or a change in address, but this back-end type of account number change, when the query went to the POI Table to directory listing indicator, it did not find the original order because that would have been made under the old account number at a different time.[53]

B. SED'S THEORY OF ADDITIONAL "BREACHES" BEYOND THE INADVERTENT RELEASE IS PURE SPECULATION REFUTED BY THE RECORD EVIDENCE[54]

Continuing its pattern of speculation, SED asserts that there were other releases of listings or "breaches."[55] In doing so, SED points to isolated emails, taken out of context, in order to obfuscate the facts. However, even SED implicitly recognizes that its claims are predicated on sheer conjecture, as it does not rely on any other "errors" or releases as the basis for any additional proposed violations or penalties.

In an attempt to "graphically" depict its claims about other releases, SED attaches a chart (Appendix 1 to its Amended Opening Brief) that it claims "represent[s] record evidence about the history of trouble tickets and other warnings Comcast received."[56] The Presiding Officer should reject SED's procedurally improper attempt to introduce this chart into the record now. SED Appendix 1 is unsupported by the evidence and is largely the product of SED's guesswork and mischaracterization of various emails and customer trouble tickets. Had SED sought to introduce the Appendix into evidence at the hearing, Comcast would have objected because of its manifest lack of foundation and would have cross-examined SED's witnesses on it. Having

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[53] Tr. Comcast (Donato) 395:11-396:23 (October 2, 2014).
[54] SED Amended Opening Brief at §III.A.2 at 27-29.
[55] SED Amended Opening Brief at 27.
[56] SED Amended Opening Brief at 28.

conceded at the hearing that it was not attempting to introduce the chart into evidence,[57] SED cannot now effectively attempt to do so by inviting the Presiding Officer to make factual findings about "other errors" on the basis of this Appendix.

Doing so would not only be procedurally improper, but would be in legal error since the chart mischaracterizes the evidence in the record. Among other items, the chart lists six internal emails allegedly "showing non-pub numbers being published," five of which Comcast witnesses Ms. Donato and Ms. Stephens clearly explained were not related to publication of a non-published number due to Comcast error:

- ***Three 2009 emails (related to the "DFO tool")***[58] – Ms. Donato explained these three emails were "all discuss[ing] the same issue" and not separate issues as implied by SED.[59] Ms. Donato further explained that DFO tool was the tool used to extract Comcast's listings to send to rural independent telephone companies, and that the issue discussed in the emails appeared to have been resolved before any files were sent or published,[60] Moreover, Ms. Donato confirmed that no Comcast non-published numbers had been published in 2009 in the territory of Frontier, the only independent telephone company in California to which Comcast provided listings.[61]

- ***October 2011 email from Comcast Director***[62] – Ms. Stephens explained that this email did not reflect a publication of a non-published number, as the "Comcast employee mistakenly believed that he had non-published service" when he

[57] SED merely used the exhibit as a "reference" during its examination of Ms. Donato. Tr. Comcast (Donato) at 452:18-28 (Oct. 3, 2014) (SED counsel statement that "I am not as this point offering it into evidence," and "I'm using this to organize this graphically . . . .").
[58] Exh. SED5/5C (Christo), Att. DD.1-3. As Ms. Donato explained during the hearing, the DFO tool was the name of the interface used for pulling directory listing files for submission to independent telephone companies. Tr. Comcast (Donato) at 460:10-461:13.
[59] Tr. Comcast (Donato) at 460:3-16 (Oct. 3, 2014) (testifying as to a series of 2009 emails that "these three e-mails that you discussed all discuss the same issue," and "it's the same question").
[60] Tr. Comcast (Donato) at 459:16-462:23(Oct. 3, 2014) (testifying that the emails "don't [reflect] that this discusses that any non-pub numbers were incorrectly published" and that "Michelle Domino, … she's the one who – at least at this time, her group was responsible for pulling these annual files" and "she indicated it was looked into and they had not sent the file while it was being looked into…. It's my understanding that whatever this was resolved before any file was sent out.")
[61] Comcast Opening Brief at 13, n. 53.
[62] *See* Exh. SED 5/5C (Christo) att. FF, Exh. SED 6/6C (Christo), Att.FF-1.

established service, but had only added the service and begun paying for it just before he sent the email in question.[63]

- ***March 2012 email from Neustar relating to "Omit Address"*** **–**Ms. Donato explained that it was unclear whether the listing in question appeared on Ecolisting but that what was clear from the email was that listing was correctly marked by Comcast as non-published.[64]

Having had five of the six emails explained away, SED pins all of it hopes on the sixth email, a July 2009 "Do you know email."[65] This email asks about issues with customers whose non-published numbers were published; in the response to the question in the email, an employee notes that another employee has been coordinating audits and can help to research the cause.[66] This email – like the others – fails to establish that there were "other releases" – to the contrary, it suggests if anything that had there been a finding of such releases, Comcast would have been investigating and addressing such errors. In other words, the Presiding Officer should give this isolated email no more credence or weight than the other discredited emails. This is especially true when it is evident from the face of the email that the issue being discussed occurred in states outside of California.[67]

The only other "evidence" that SED cites to in support of "other errors" are the trouble tickets on the misleading Appendix 1 discussed above.[68] Essentially acknowledging Comcast's unrefuted testimony that only a small percentage of these tickets were from customers impacted

[63] Exh. Com 106/106C (Stephens) at 12.
[64] Exh. Com. 104/104C (Donato) at 17.
[65] SED Amended Opening Brief at 27.
[66] Exh. SED-5/5C (Christo), Att. GG.
[67] The email is between Comcast employees in the "Freedom Region," which was comprised of eastern states. Those states did not rely on the billing system that Comcast uses in California. *See* Exh. Com 6/6C (Christo), Att. A, at 10 (Freedom Region includes "New Jersey, Eastern Pennsylvania, Northern Delaware"). Exh. Com 106/106C (Stephens) at 29, n. 35 ("Comcast uses the CSG billing system for all of its West Division market including California.).
[68] SED Amended Opening Brief at 27-28.

by the Process Error,[69] SED asks the reader of the brief to speculate as to whether the other customers might have been affected by a different process error.[70] SED suggests that "Comcast does not say,"[71] but SED is wrong. As Ms. Stephens explained during the hearing, these other tickets were opened for a variety of reasons that did not relate to the Release or to any error by Comcast.[72] Many were from customers whose telephone listing had previously been published (either by Comcast or another company) *before the Customer elected non-published status*.[73] As examples, Ms. Stephens provided copies of three trouble tickets (Exh. Com 118C – all of which were produced to SED prior to the hearing): (i) the first of which (CR197486983) related to a customer who had paid for non-published status on only one of her two lines and was complaining that the second line was being published, (ii) the second of which (CR192216628) concerned a customer who was published due to a different provider's publication of the listing (the error was not Comcast's); and (iii) the third ticket (CR 1922166828) related to customer who had changed a previously published number to non-published in 2009 and was complaining about publication in a phonebook that pre-dated the customer's status change.[74] In short, there is nothing to SED's unsupported theory that these trouble tickets evince other releases.

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[69] *See* SED Amended Opening Brief at 29.
[70] SED Amended Opening Brief at 28.
[71] *Id*.
[72] Tr. Comcast (Stephens) at 552:23-553:9 ("the overwhelming thing I saw on I think all of these except one where we didn't see anything, they weren't even listed as non-published, is that they were all published at one time" and "for instance, … we talked about Yellow Pages and things, but they had changed to non-published in 2009" and "were already in the Yellow Pages") (Oct. 3, 2014).
[73] Tr. Comcast (Stephens) at 542:19-24 (Oct. 3, 2014) ("several of the examples really were around they were published, either ported in as a published number or originally set up as a published number").
[74] Tr. Comcast (Stephens) at 542:1-24 (Oct. 3, 2014); Exh. Com 118C. SED's Amended Opening Brief "renews its objection to Exhibits COM 115, 116 and 118" and in support of those objections attaches a Declaration of Counsel. *See* SED Amended Opening Brief at 46, fn. 157 and Appendix 3. SED's renewed objections contravene SED's representation at the hearing, where it stipulated to the admission of the exhibits and indicated it might file a declaration as to the weight it believes should be afforded to this evidence. *See* Tr. (Witteman) 551:9-13 (Oct. 3, 2014). Thus, any "renewed objections" should be

C. THE DURATION AND EXTENT OF THE RELEASE ARE WELL ESTABLISHED IN THE RECORD

As an initial matter, there does not appear to be a disagreement about the extent of the distribution of the listings. As the record evidence demonstrates and SED concedes, the non-published listings went to Neustar and (i) Neustar provided files to Microsoft FAST for publication on Ecolistings, (ii) to Comcast's directory assistance provider (kgb), and (iii) and Comcast affiliate Plaxo.[75] Neustar also provided files containing a portion of the non-published listings for testimony purposes to Supermedia, Valley Yellow Pages, Relevate and Intelligenx.[76] The only issue in dispute regarding the extent of distribution of the listings is whether the listings went from Neustar to other third parties and to LSSi; SED asserts that "[it] is uncertain."[77] As is explained below, the record evidence clarifies that none of these further distributions occurred.[78]

SED does, however, question Comcast's explanation of the duration of the Release. "SED believes that non-published customer information may have been leaked before July 1, 2010 and that non-published information remained in directories (and apparently also on the internet apart from Ecolisting) long after December 10, 2012."[79] This belief is also mistaken. SED ignores unrefuted evidence from Ms. Donato, corroborated by Mr. Chudleigh, that Neustar had not provided the non-published listings

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rejected as procedurally improper. Moreover, these three exhibits are already in evidence and should be afforded substantial weight: (i) they directly respond to SED's surrebuttal testimony and exhibits (and thus were proper subjects for surrebuttal testimony); and (ii) were supported by Ms. Stephens' oral surrebuttal testimony and her review of customer records. *See* Tr. (Stephens) 537:19 – 538:6 (Oct. 3, 2014). At most, counsel's declaration evinces a misunderstanding between counsel regarding the use of written rebuttal testimony vs. exhibits, which should not impact the weight afforded to these Exhibits, much less offer a compelling reason for reconsideration of their admission.

[75] SED Amended Opening Brief at 36-40.
[76] SED Amended Opening Brief at 40-41.
[77] SED Amended Opening Brief at 43.
[78] *See* section § III.E and III.G, *infra*.
[79] SED Amended Opening Brief at 42.

to any third party before July 2010.[80] Mr. Chudleigh also confirmed that Comcast did not license listings to kgb (a directory assistance provider that acted as Comcast's agent) until November 2010; and that it did not license Comcast California listings to any other entity before 2013.[81]

In support of its theory that the non-published listings may have "leaked earlier," SED cites a "full data refresh" consisting of non-published listings that Comcast supposedly sent to Neustar on February 2, 2010 and speculates that Neustar "*may* have sublicensed the data in early 2010."[82] The only support offered for this conjecture is that "[w]e know that Targus' affiliate Localeze had entered into a contract with kgb in 2009."[83] As Mr. Christo (SED's witness) admitted, however, SED's belief that Targus may have licensed the data sooner under that 2009 contract is nothing more than speculation.[84] In fact, as the contract itself clearly establishes (and

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[80] Comcast Opening Brief at 14. Exh. Com 103/103C (Donato) at 10, 25 (confirming Neustar first sent listings to Comcast's vendor Microsoft FAST in June 2010 to incorporate into Ecolistings, which launched in July 2010).

[81] Exh. Com 104/104C (Donato) at 12, Att. D (Neustar Declaration) at ¶¶ 8-10 ("for a very limited time beginning November 2010, the affected records were provided to Comcast's directory assistance provider – kgb;" "Neustar discontinued providing Comcast-sourced DL Records to kgb as of October 1, 2011;" "[w]ith the exception of kgb, there were no sales or licenses entered into between Neustar and any other entities for Comcast-sourced subscriber DL Records for California customers prior to 2013, and Plaxo was the only other entity that received Comcast-sourced subscriber DL Records for California customers sourced for use or publication… prior to 2013."). *See also* Tr. Neustar (Chudleigh) at 263:19-28 (Oct 2, 2014).

[82] SED Amended Opening Brief at 43.

[83] SED Amended Opening Brief at 43 citing Exh. Com. 104/104C (Donato), Att. E.).

[84] Tr. SED (Christo) at 227:25-228:16 (emphasis added):

> A. I think what I state here is we know that Targus affiliate Localeze entered into a contract with kgb on November 29th, 2009. I think I'm noting that there was a contract entered into as it is reflected in my testimony, yes.
> Q. But your testimony above that says that in your view it appears that Targus/Neustar may have gotten the data in February of 2010; is that right?
> A. Yes.
> Q. So you are saying that it is possible then the contract entered in a few months prior to that with Localeze included the shipment of data to that entity?
> A. Yes.
> *Q. But, again, you don't know that for sure?*

as was confirmed by Mr. Chudleigh at the hearing), the only product licensed to kgb by Neustar in 2009 was a business listings product—Localeze Internet Yellow Pages Files—that had nothing to do with Comcast or its residential directory listings.[85] The Product Schedule (Amendment to the Localeze contract) that evidences the license of *Comcast* directory listings to kgb was not executed until November 1, 2010.[86]

SED's assertion that the Process Error may have continued *after* December 2012 is equally unsupported by the record. For this theory, SED cites a declaration by "Jane Doe 10," which attached a 2012-2013 telephone book from Valley Yellow Pages that included her non-published name. SED posits that "[t]he only permissible conclusion here is that the data breach continued, for many customers in Frontier Territory at least, until well into 2013."[87] To the contrary, as documents SED itself introduced at the hearing show and as Mr. Christo acknowledged on cross-examination, Jane Doe 10's number continued to be published because a 2011 Frontier phone book *was copied by Valley Yellow Pages*; it was *not* due to Comcast's further distribution of listings in 2012 to Frontier.[88] Like SED's other unfounded theories about the duration of the Release,[89] this one has no basis in fact.

A. I do not know that for sure, no.

[85] Exh. COM 104C (Donato) Att. E at Bates 017361 "Localeze Product Schedule dated Nov 16, 2009; *see also* Tr. Neustar (Chudleigh) at 230:7-14 (Oct. 2, 2014).

[86] Exhibit 104C (Donato) Att. E at Bates 011216 "Product Schedule – CSP MSO Residential Directory Listings" dated November 1, 2010 which provides that "The data to be licensed from Amacai to CLIENT [kgb, USA, Inc.] subject to the terms and conditions in this Product Schedule is the Comcast [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] [other cable company] Listing database"); *see also* Exhibit 104C (Donato) Exhibit D (Chudleigh Declaration) at paragraph 8 ("for a very limited period of time beginning November 2010, the affected records were provided to Comcast's directory assistance provider – kgb"); *see also* Tr. Comcast (Donato) at 406:24-28 to 407:1-2 (noting contract between kgb and Neustar for Comcast listings between November 2010 and October 2011) (Oct. 2, 2014).

[87] SED Amended Opening Brief at 43.

[88] *See also* Tr. SED (Christo) 172: 2-6 (Oct. 1, 2014):

Q. And we know that there is at least one publisher in California that copied the Frontier directory, so listings got in there as well?

D. THE TIMING OF COMCAST'S DISCOVERY OF THE RELEASE AND THE CORRECTION OF THE PROCESS ERROR ARE WELL ESTABLISHED IN THE RECORD

SED does not offer much comment on the timing of Comcast's discovery of the Release or the company's corrective actions [90] nor could it. As the uncontested evidence in the record establishes and as Comcast detailed in its Opening Brief, the company did not receive the two trouble tickets that led to the its discovery of the Process Error and the Release until October 2012 and did not determine the full extent of the Release until late November / early December 2012.[91] Moreover, Comcast's efforts to quickly correct the Process Error, and remove the non-published listings from publication are fairly well-established and uncontested. [92] The real disagreement is with respect to SED's claims that Comcast should have discovered the Process Error sooner.[93] Comcast addressed this issue in depth in its Opening Brief[94] and also addressed the reasonableness of its practices in this Reply Brief in response to SED's claim that the delayed discovery of the Process Error constitutes a section 451 violation – see section IV.D.3. below.

A. Yes.

Although on re-direct Mr. Christo softened his earlier answer (Tr. SED (Christo) at 244: 9-11 stating that he wasn't certain that the Frontier book had been copied by Valley Yellow Pages) that is what the Valley representative appears to have conceded in the email she sent Jane Doe 10. *See* SED 3/3C (Momoh) at Att. B Jane Doe 10 Exh. A (email from Jane Doe 10 to Frontier, explaining that "I just spoke with Robin Johnson of the Valley Yellow Pages. She stated that my name & phone number was obtained thru the Frontier Pages of the Elk Grove Directory, May 2011. It was not a specific listing from Frontier, but a published telephone directory.")

[89] SED also attempted to argue during the hearing that the fact that a customer, "Ms. J," had continued to be published on Ecolisting was continuing evidence of the Process Error. However, as Comcast demonstrated during the hearing, Ms. J. is not currently purchasing non-published listings, and thus the fact that her listing is published provides no support for SED's contention. *See* Tr. Comcast (Stephens) at 613:3-614:24 (Oct. 3, 2014) (noting that Ms. J "does not have non-published service" currently), Exh. Com 119 (bills that confirm that "the lack of [Ms. J's] having – paying for non-published – the dollar-fifty fee for non-published service.").

[90] *See* SED Amended Opening Brief at §§ II.C and III.E.

[91] Comcast Opening Brief at 15-17.

[92] Comcast Opening Brief at 17.

[93] *See* SED Amended Opening Brief section III.D at 44-45.

[94] Comcast Opening Brief at 16-17.

E. COMCAST POLICIES AND PROCEDURES REGARDING NON-PUBLISHED NUMBERS WERE REASONABLE: *SED'S ATTEMPT TO INTERJECT THE ISSUE OF DATA BROKER PRACTICES INTO THIS CASE IS MISGUIDED.*

SED attacks as unreasonable Comcast's policies and procedures regarding non-published listings, including its consumer disclosures for non-published status and processes, its process for identifying non-published status, and contracts for distribution of these listings. There is no basis for these claims. The reasonableness of Comcast's non-published disclosures and processes to extract non-published status is addressed below, in Section IV.D.3. As for SED's claim that Comcast distributed non-published listings inappropriately, it spins unfounded theories that Comcast deliberately distributed listings to data brokers.

Specifically, SED spends much of its brief decrying data brokers and maintains that "[t]his Investigation has pulled back the 'veil of secrecy' around data marketing and the role telephone carriers play in that industry."[95] SED urges the Commission to open a rulemaking proceeding to address the relationship of directory listing and data marketing practices.[96]

Yet this proceeding has nothing whatsoever to do with the issue of data marketing and involved no data brokering. The record here makes clear that Comcast is not a data broker, that Comcast's directory listing distribution agent (Neustar) has not used Comcast's directory listing information for any data brokering purposes, and that the Release—the focus of this proceeding—has no connection to the issue on which SED has curiously chosen to focus.[97] In continuing to stress this entirely unfounded issue, SED has strayed far from its mandate to

[95] SED Amended Opening Brief at ii.
[96] SED Amended Opening Brief at 2.
[97] Tr. SED (Tien) at 59:9-15 (Oct. 1, 2014) (conceding Comcast doesn't engage in selling data products); Exh. Com 104/104C (Donato) Att. D (Chudleigh Decl.) at ¶ 6; Exh. Com 107/107C (Miller) at 4-10.

investigate issues surrounding the Release, and this frolic – based on nothing but speculation and innuendo -- should not be countenanced.[98]

SED itself appears confused about its argument. At times SED seems to be asserting that Comcast is in league with data brokers and selling customer listing information—including non-published numbers—to data brokers.[99] Yet SED is unable to point to a shred of evidence (nor is there any) that supports that theory. At other times it seems that SED is simply concerned that today's robust data analytics industry—enhanced by modern data-processing tools and the power of the internet—highlights the importance of safeguarding customers' information.[100] This may very well be true. But SED has not established any connection between Comcast—or this case—and such concerns, and its arguments about the supposed "predations of the data industry" are thus a topic best left to another day.[101]

SED's related assertion that Comcast has operated behind a "veil of secrecy" is equally unfounded, SED seeks to portray longstanding, often legally mandated, carrier practices—like publishing telephone directories and providing "411" Directory Assistance—with what SED characterizes as the "predations of the data industry." Like other providers of voice services, Comcast makes its customers' listings available in directories—a universally used and useful

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[98] Indeed, SED was specifically directed in the OII that if it wanted to expand its investigation that it was to "bring any newly discovered information or alleged violations by Respondents to our attention. Staff may present additional allegations to the ALJ in the form of a motion to amend the scope of this proceeding, which shall be supported by a further staff report or declaration supporting the proposed amendments." OII at 21. (Ordering Para. No. 8.)

[99] *See, e.g.* SED Amended Opening Brief at 35 ("Thus, the non-published account numbers were exposed to the risk that they would be incorporated into some of Targus' data products designed for credit agencies and other customers."); SED Amended Opening Brief at 10 and n. 31 ("In any event, Comcast's practice put the personal and confidential customer information of non-published subscribers into the hands of data marketers, even if there were allegedly structural protections in place" which structural limitations "may or may not have been observed in practice.")

[100] *See* SED Amended Opening Brief at iii (noting concerns in the "new digital, networked world").

[101] SED Amended Opening Brief at iii.

tool for consumers. And Comcast must also provide its customers' listing information to others so that they can provide their own directories and directory assistance ("DA") services, as required by the pro-competition provisions of the Communications Act.[102] As explained below, there is nothing improper or nefarious about this practice—indeed, it is required by law. Those activities clearly cannot be sanctioned as improper; that theory, if it indeed is SED's suggestion, is hardly credible.

1. The Evidence Shows that Comcast Takes its Obligation to Safeguard Customer Data Very Seriously.

In contrast to SED's vague suggestions of Comcast's supposedly shadowy practices when it comes to customer data, what this proceeding *has* shown—the Release notwithstanding—is that Comcast takes its duty to safeguard customers information very seriously. Comcast's directory listing contracts demonstrate this to be the case. Comcast has produced in discovery numerous such contracts, both with its current and former distribution agents (Neustar and LSSi, respectively), as well as with eligible licensees (directory assistance providers such as kgb, and directory publishers).[103] *All* of these agreements contain restrictions that prohibit licensees from using Comcast information for purposes other than providing directories or DA services.[104] And Comcast enforced these restrictions. As Mr. Miller testified, Comcast had significant communications with Neustar about the companies they were licensing Comcast listings to (phone conversations, meetings, monthly sales reports) and requested legal and technical analysis of the license agreements, as explained more fully in Section IV.D.3 of this brief. In addition, although largely irrelevant to the investigation into the Release (since

[102] Comcast addresses this more fully in Section IV.D.3.
[103] *See* Exh. SED 5/5C (Christo), Att. S (LSSi contract); Att. T (Targus/Neustar) Contract; Att. Y (kgb contract).
[104] Exh. Com 107/107C (Miller) at 5-6.

LSSi did not receive the non-published listings), Comcast's dealings with LSSi (discussed more fully in Section III.G) are further evidence of the steps Comcast takes to safeguard its customers' data.

2. Neustar Has Not Used Comcast's Directory Listing Information for Data Brokering Purposes

The evidence also shows, beyond question, that Comcast's directory listing distribution agent, Neustar, has *not* used Comcast listings for "data brokering" purposes. SED's allegations to the contrary ignore the testimony of Neustar executive Mr. Steven Chudleigh, the Senior Vice President for Data Strategy at Neustar, who has direct knowledge of Neustar's use of Comcast's data and worked for Targus (acquired by Neustar in 2011) since Targus first became Comcast's directory listing agent in 2009.[105] Mr. Chudleigh specifically testified at the hearing that Comcast-sourced records are not included in Neustar's other data files.[106]

Moreover, Mr. Chudleigh's testimony expressly refutes SED's claim that Comcast non-published listings are "used … to corroborate [Neustar's] consumer databases(s)."[107] To the contrary, Mr. Chudleigh specifically testified that that is *not* the case. Indeed, the testimony excerpted below addresses the very claim made in SED's brief.[108] As Mr. Chudleigh explains, Comcast records are *not* used to improve records that Neustar has obtained from other sources, and are set aside from other data in Neustar's data base.

> Q.: So when Mr. Witteman was asking you before about the document about the DLP build process, which has been marked for identification as SED-07-C [*see* SED Amended Opening Brief at 32-33]. When he's

[105] Exh. Com. 103/103C (Donato) Att. D ¶¶ 1-3.
[106] Tr. at (Chudleigh) at 278:6-11 (Oct. 2, 2014) (confirming Comcast-sourced records are not incorporated into Neustar's DLP product); *see also* Exh. Com 104/104C (Donato) at Att. D ¶ 5 (Neustar does not incorporate Comcast-sourced records into its DLP product).
[107] SED Amended Opening Brief at 33.
[108] SED Amended Opening Brief at 32-33.

> asking you about the corroboration that occurs, just to be clear on this, are the Comcast private records … being used to change or update records in either the DLP or the PCP that will in turn being provided to other parties?
>
> A.: No, because again, there's no matching record. Those records are unique to Comcast. There's no way to improve a record that we don't have [in the DLP].
>
> Q.: So … what do you mean by corroboration? In what way, if any, are the Comcast-sourced – uniquely-sourced Comcast records – [being used] if they are corroborating information in the DLP?
>
> A.: Okay. So they – they come in to -- as they're coming to the repository.
> Q.: Is the "they" the Comcast-sourced records?
>
> A.: I'm sorry. We don't know they're uniquely sourced from Comcast until they come into the repository and have a chance to be compared against the rest of the records in the repository. And so that's – that's – within the context of this document [SED-07-C], that's what that meant when it said corroboration. It meant that all of the Comcast records are brought in and compared to the existing set of records. And then any that are not found within our existing s[et] of records are flagged appropriately as Comcast unique or Comcast private and are set aside. *And there's no further … use of those records other than to be set aside to be held to be fulfilled to* [*Comcast*] *directory publishers and to DA and for Ecolistings*.[109]

While SED ignores this exchange and focuses on another passage of Mr. Chudleigh's testimony, the foregoing specifically clarified that the Comcast records are not being used to update or change other records in the DLP.[110]

Finally, Mr. Chudleigh corroborated Comcast's testimony that Neustar distributed "production files" of the inadvertently released non-published listings only to the Ecolisting

[109] Tr. Neustar (Chudleigh) at 302:10 to 303:24 (emphasis added) (Oct. 2, 2014) (emphasis added).
[110] SED claims that this line of questioning (*see supra* note 146) was just an attempt by Comcast to "muddy the situation," cites to various documents listing Comcast source listings as a feed into the DLP file database, and notes Comcast records are in the DLP that is provided to credit bureaus and debt collectors. SED Amended Opening Brief at 34. However, as Mr. Chudleigh explained, even though the Comcast stored data may go to a central repository called the DLP, only eligible recipients are given access to data through decryption keys. Tr. Neustar (Chudleigh) at 278:28-279:8 (Oct. 2, 2014).

directory website (Comcast's on-line directory), kgb (Comcast's DA provider), and Plaxo (a Comcast-affiliated business networking website).[111] No other party was provided a file of the non-published listings for a purpose other than testing.[112]

F. THE EVIDENCE SHOWS THAT COMCAST WAS DILIGENT IN NOTIFYING CUSTOMERS OF AND PROVIDING REMEDIES RELATED TO THE PROCESS ERROR

SED also criticizes Comcast's efforts to notify customers and claims that the remedies Comcast has provided are inadequate.[113] SED makes three main charges: (1) notification efforts to reach former customers were inadequate—citing to the approximately 19,000 who did not contact Comcast for a refund;[114] (2) the remedies were generally insufficient to address the harm;[115] and (3) Comcast did not implement online site removal tools to remove non-published listings from other online directories.[116] SED also makes a half-hearted attempt to claim that Comcast's remedies compare unfavorably with those provided in the Cox case involving a similar inadvertent release of customer listings.[117] SED then offers several "suggestions" for additional notification methods and remedies it contends Comcast should provide: live-calling former customers; issuing a press release; and online site removal.[118]

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[111] Exh. Com 104/104 (Donato) at Att. D.. at ¶ 10).
[112] *See* Exh. Com 104/104C (Donato) at Att. D. ¶ 10 and Tr. Neustar (Chudleigh) at 294:12-23 (Oct. 2, 2014).
[113] *See* SED Amended Opening Brief at 65-79.
[114] SED Amended Opening Brief at 70-71.
[115] *See* SED Amended Opening Brief at 75-80.
[116] SED Amended Opening Brief at 77-78.
[117] SED Amended Opening Brief at 79-81 (discussing D.01-11-062).
[118] SED Amended Opening Brief at 73-74 (suggesting calls be placed to former customers who ported their number); SED Amended Opening Brief at 79 (Comcast should have commissioned online site removal).

The record evidence demonstrates that Comcast personnel acted reasonably and expeditiously to identify and notify all Affected Customers—both current and former.[119] In addition, Comcast established a refund mechanism for all Affected Customers, together with an escalation process that was designed to address concerns raised by Affected Customers and to provide additional remedies individually tailored to the particular needs of specific customers, including customers with safety concerns.[120] By contrast, SED's proposed measures for additional notification and remedies are impractical and may have unintended negative consequences.[121]

1. Comcast's Efforts to Notify Former Customers were Reasonable and Consistent with the Law.

a. *Notifying Former Customers by Written Letter was Reasonable.*

Comcast's method of contacting former customers by a notification letter to the customer's last known address was reasonable and is consistent with Commission precedent, state policy, and industry standard. In Decision No. 94-04-057, the Commission noted that Pacific Bell's method of notifying former customers of a refund through direct mail was effective.[122] California's unclaimed property statute similarly provides that a holder of property is to provide written notice to a potential property owner ***at the person's last known address*** before the property should be returned to the state.[123] Tariffs approved by this Commission—

[119] Comcast Opening Brief at 20 citing Exh. Com 103/103C (Donato) at 17; *see also* Exh. Com 105/105C (Stephens) at 2.
[120] Exh. Com 105/105C (Stephens) at 7-10 (discussing remedies and amounts of refunds)
[121] *See Cox*, D.01-11-062 *mimeo* at 21 (noting that publicity "might have the perverse effect of reawakening public anxiety about the tainted directory problem").
[122] *See* D.94-04-057 *mimeo* at 21 (also noting that publication could be effective to notify customers of an account overcharge).
[123] *See* Cal. Unclaimed Property Law Title 10, Chapter 7, Cal. Code Civ. Proc. §§1530 & 1531; *See also* Guidelines for Reporting Unclaimed Property by the SCO: http://www.sco.ca.gov/Files-UPD/outreach_rptg_hol_genrptinfo.pdf (step 3).

which have the force of law[124]—similarly provide that refunds owed former customers via written notice to the customers' last known address unless the customer provides a new address.[125] SED does not address this legal authority in its brief.

Instead, SED points to low response rate for former Affected Customers, asserting that the "most plausible reason" for the 10% response rate "is that [former customers] didn't receive the notification letter."[126] This is mere speculation, however; there is no evidence in the record to support that conclusion. What is in evidence is the fact that almost 90% of former Affected Customers do not port their telephone numbers when they terminate service with Comcast—meaning the unpublished phone number that was released was not the *current* phone number for approximately 90% of former Affected Customers.[127] This suggests an equally if not more plausible explanation for the low response rate—the former customers were likely less affected by, and thus less concerned about the Release. Moreover, a 10% response rate from former Affected Customers is not inconsistent with the overall response rate. The number of *current* Affected Customers who called the dedicated toll free line was less than 16%.[128] A six percent

[124] *E.g., So. Cal. Edison, Co. v. City of Victorville*, 217 Cal. App. 4th 218, 228 (2013) (noting that "a tariff, when approved by the PUC, has the force of law").
[125] *See e.g.,* Tariff of Verizon California, Inc., Schedule Cal. P.U.C. No. D.R. 3rd Revised Sheet 33.3 attached as Appendix 3 ("Refund checks will be mailed to the service address shown on the customer's monthly bill unless the customer provides a new mailing address."). Comcast has concurrently filed a motion for the Commission to take official notice of this tariff.
[126] SED Amended Opening Brief at 72.
[127] Tr. Comcast (Munoz) at 349:1-9 (Mr. Munoz testified that only approximately 12% of Comcast California customers port their telephone number annually.)
[128] Comcast received approximately 11,000 calls to the specially established 1-800 toll free number. Exh. Com 105/105C (Stephens) at 13. Approximately 2,400 of these calls were from former Affected Customers requesting refunds. *Id.* Even conservatively estimating that all of the remaining 8,600 calls were from current customers and that these customers called only once would equate to a response rate for current customers of less than 16% (8,600 ÷ 54,000 current Affected Customers = 15.92%). *See* SED Amended Opening Brief at 71, n. 241 (citing Comcast testimony for the total number of current Affected Customers).

delta between current and former customers calling is neither significant nor evidence that Comcast's efforts were anything but reasonable.

b. *Live Calling Former Customers Would Be Impractical and Ineffective*

SED has failed to introduce any evidence that live calling former customers would be effective; to the contrary, Comcast has introduced evidence that suggests such an approach would be fraught with potential problems. For example, Ms. Stephens testified that once a customer terminates his or her service with Comcast, the company no longer has a current and reliable telephone number for the customer.[129] SED responds that Comcast should still place live calls to customers who port their old number to their new carrier—[130] even though as discussed above, only 10% of California Comcast customers port their number upon termination of service,[131] and even for these customers, Comcast cannot be certain it has an accurate *current* contact number because the customer could have changed their number after they left Comcast. Accordingly, it would be futile to call former Affected Customers.

Moreover, SED's persistence that Comcast place live calls to these customers[132] ignores a host of customer privacy and security issues. As Mr. Momoh conceded, before discussing the nature of the call with whomever answered the phone, Comcast would need to authenticate the identity of the former customer to ensure confidential information is not provided to an unauthorized third party.[133] While Mr. Momoh apparently thinks it would be reasonable to

[129] Exh. Com 105/105C (Stephens) at 6.
[130] SED Amended Opening Brief at 73.
[131] Tr. Comcast (Munoz) at 348:26-349:9.
[132] SED Amended Opening Brief at 73.
[133] Exh. SED (Momoh) 5, n. 21; Tr. SED (Momoh) at 122:18-25 (Oct. 1, 2014). *See also generally*, 47 C.F.R § 64.2010(b) (2014) (discussing limitations on carrier initiated contact with customers and information that may be requested to verify identity).

confirm a stranger's identity by asking them to provide their social security number or mother's maiden name,[134] that is exactly what privacy experts counsel against.[135] Indeed, the AG warns consumers to never give out their information unless *they initiate* contact with a company.[136]

c. *Issuing a Press Release Could Harm Affected Customers*

Issuing a press release also raises significant privacy issues. As the Commission recognized in the Cox case, press coverage and the attendant publicity could actually exacerbate the issue for customers whose private information had already been inadvertently disclosed. In Cox, the Commission expressed concern about "bring[ing] the issue of the erroneous directory listings. . . back to the public eye" because "Cox's customers stand to be further harmed as a result of the attendant publicity."[137] And because "awareness of the tainted directory issue has faded" the Commission declined to "reawaken public anxiety" by instituting a penalty phase, which the Commission recognized would generate substantial press coverage.[138]

A press release here poses similar concerns. The evidence in the record confirms that the Release was fixed in December 2012, almost two years ago to the day. To issue a press release now would needlessly re-ignite customer privacy concerns.

2. Remedies Comcast Provided Affected Customers were Reasonable

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[134] Tr. SED (Momoh) at 123:19-28 (Oct. 1, 2014):

> Q.: Right. So should we ask her, for example, could she give us her Social Security number, or give us her date of birth, or her mother's maiden name?
> A.: I believe that would be reasonable request.
> Q.: And in your experience would most customers provide that information over the phone to someone who calls them and just claims to be Comcast?

[135] *See* 47 C.F.R. § 2003(m) (2014); *E.g.*, http://oag.ca.gov/idtheft/facts/top-ten; *see also* Identity Theft Resource Center: http://www.idtheftcenter.org/Protect-yourself/id-theft-prevention-tips.html; Privacy Rights Clearinghouse: https://www.privacyrights.org/social-security-numbers-faq#1

[136] *E.g.*, http://oag.ca.gov/idtheft/facts/top-ten.

[137] D.01-11-062 *mimeo* at 21.

[138] D. 01-11-062 *mimeo* at 29 (Conclusion of law No. 5).

SED's characterization of Comcast's remedies as "minimal" is without merit.[139] In its Opening Brief, Comcast detailed its efforts to provide all Affected Customers a refund, which the company automatically credited to all current customers and provided to all former customers who contacted it.[140] Comcast also made additional remedies available to customers on an individualized basis through an escalation process, which automatically included all customers who expressed a safety concern.[141] The evidence establishes that Comcast was responsive to customers who availed themselves of this option and provided them with additional remedies they sought.[142] Comcast provided an average of approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** in additional credits or compensation to all customers who availed themselves of that option.[143]

To be clear, Comcast deeply regrets the error and does not in any way minimize the concerns of its customers. But it is important to recognize in assessing the remedies Comcast provided that the harms identified by SED fall into three categories: concerns about customer safety, concerns about unwanted telemarketing calls, and the concerns about the dissemination of their phone numbers on the internet.[144] SED concedes that there is no evidence that any physical

[139] SED Amended Opening Brief at 76.
[140] *See* Exh. Com 105/105C (Stephens) at 7. Credits were automatically posted for any customer with an active account (for any Comcast service). The refund covered the entire period their non-published information was inadvertently released. Exh. Com 105/105C (Stephens) at 9.
[141] *See* Exh. Com 105/105C (Stephens) at 12.
[142] Tr. (Burcham) at 162:8-163:9 (Oct. 1, 2014) (confirming that Comcast paid for three years of internet service since at Ms. Doe 11's request.)*see also* Exh. Com 118C (reviewing the nine customer accounts Mr. Momoh claimed were initially dissatisfied with Comcast remedies but eight of nine received additional remedies and signed releases through the escalation process.)
[143] *See* Exh. Com 105/105C (Stephens) at 17; *see also* Exh. Com.
[144] *See* SED Amended Opening Brief at *passim*.

harm resulted from the Release[145]—a fact that distinguishes this case from other cases in which the Commission has imposed substantial penalties for violations of the law.

With specific regard to customers with safety concerns, Comcast automatically escalated customers who called and expressed safety issues[146] and further offered extensive redress to those customers, including (among other things) paying for security systems.[147] Indeed, the record establishes that customers with safety concerns who contacted Comcast received an average of approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** in additional redress.[148] Regarding telemarketing concerns, Comcast offered customers a free number change and additional service credits and promotions.[149] And, with respect to Affected Customers' phone numbers being disseminated on the internet, there is no remedy that will guarantee that the customer's phone number will be *completely* removed—especially if the customer wants to retain their current number—SED's own witness conceded as much.[150] However, as explained below, to order Comcast to pay for internet scrubbing services to try to remove all of the Affected Customers' phone numbers from the internet is both impractical and ultimately futile.

Moreover, as Comcast explained in detail in its Opening Brief, and as it explains in Section V, *infra* (Penalties Analysis) and demonstrate in the attached Chart (Appendix 5), the remedies the company provided Affected Customers are comparable to those afforded to the customers in Cox.

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[145] SED Amended Opening Brief at 111.
[146] *See* Exh. Com 105/105C (Stephens) at 12.
[147] *See* Exh. Com 105/105C (Stephens) at 15.
[148] Exh. Com 106/106C (Stephens) at 23.
[149] Exh. Com 105/105C (Stephens) at 14.
[150] Tr. SED (Tien) at 18:1-17 (Oct. 1, 2014) (conceding unknowns associated once information goes "in to the wild" of the interest).

3. Providing Online Removal is Neither a Viable Option Nor One Which is Likely to Be Effective

Finally, SED is mistaken in contending that Comcast's failure to provide an online removal service was inconsistent with company policy.[151] Although a 2009 company work aid provided for removal from certain online directories (a service Comcast had provided to a some individual customers who called in the past),[152] Comcast no longer provides this service. The reason for that change is, as Ms. Stephens testified at the hearing, third party companies now require that anyone seeking to remove what they claim is personal information produce some proof of identity to show the information being removed is the requesting party's own information.[153]

In an attempt to undercut Ms. Stephens's testimony, SED cites isolated instances where a Comcast customer care representative appears to have removed a listing from a single website (Whitepages.com) in 2013.[154] However, SED offers no evidence that such removal would be permitted today or could be performed for other websites.

More fundamentally, as SED itself concedes,[155] *online scrubbing services simply do not work*. Indeed, SED recognizes that "the likelihood of completely scrubbing the internet clean of

[151] SED Amended Opening Brief at 77-79.
[152] Exh. Com 106/106C (Stephens) at 8-9, Att. B.
[153] *See* Tr. Comcast (Stephens) at 534:5-15.
[154] *See* SED Amended Opening Brief at 69, n. 232 (citing Exh. SED 2C (Momoh) Att. I). At the hearing, Comcast also proffered documentary evidence to confirm Ms. Stephens's testimony that requiring proof of identity is the generally accepted practice online today, which SED objected to. *See* Tr. Comcast (Stephens) at 535:1 – 537:26 (Oct 3, 2014). Comcast notes this point because it seems inconsistent for SED to now propose online scrubbing as a remedy, yet to have objected to allowing the Presiding Officer to receive evidence that goes to the feasibility of SED's suggestion. Although Comcast ultimately withdrew the proffered materials to avoid further dispute with SED and move the already-behind hearing forward, the Presiding Offices of course may take official notice of these online removal policies and consider this information as he deems appropriate.
[155] *See* SED Amended Opening Brief at 6; Tr. SED (Jane Doe 11) at 159:10-13, 23-25 (Oct. 1, 2013).

this information is extremely small."[156] Similarly, SED's witness (Jane Doe 11) confirmed that although she had asked Comcast to pay for three years of an internet scrubbing service (and in fact Comcast did pay for that service),[157] it has not worked.

> I hired a service called reputation.com that supposedly can help scrub your information off the internet. ***It's been very unsuccessful***. . . . It is a service I paid for and is – as it appears is ***woefully inadequate*** . . . .[158]

For this reason, ordering Comcast to spend millions of dollars to engage in this futile exercise makes no sense.[159] The Presiding Officer should decline SED's invitation to waste such considerable resources.

G. SED'S ALLEGATIONS ABOUT COMCAST'S HANDLING OF ITS DISPUTE WITH LSSi AND MR. MILLER'S CREDIBILITY ARE UNFOUNDED AND UNSUPPORTED BY THE RECORD

SED's brief devotes considerable attention to Comcast's dispute with LSSi, although, bowing to the evidence, SED appears finally to have abandoned the claim that LSSi received and subsequently distributed non-published listings.[160] Instead, SED suggests that Mr. Miller's role in Comcast's decision to terminate its contract with LSSi, the litigation that followed, and certain statements that Mr. Miller made in the LSSi litigation and in this proceeding, cast doubt on Comcast's credibility.[161]

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[156] SED Amended Opening Brief at 6.
[157] Tr. SED (Jane Doe 11) at 162:13-163:7 (Oct 1, 2013).
[158] Tr. SED (Jane Doe 11) at 159:10-13, 23-25 (Oct 1, 2013) (emphasis added); *see also* http://www.reputation.com/. This—along with the fact that Comcast ultimately paid for this service—is a point the Presiding Officer also confirmed with Jane Doe 11. *Id.*
[159] *See* section V.G, below.
[160] *See* Comcast Opening Brief at 15, n. 65 (explaining that the Process Error did not affect the listings provided to LSSi and that LSSi did not receive non-published listings); *see also* SED Amended Opening Brief at 42 (conceding that it is "uncertain" that non-published listings "went to LSSi").
[161] SED Amended Opening Brief at 13-18, 29, 42, 61.

In particular, SED claims that Mr. Miller "li[ed] under oath" in the LSSi proceeding,[162] and was involved in what SED has claimed was Comcast's effort to hide in *this* proceeding evidence of the fact that kgb received Comcast non-published listings from Neustar during the Process Error period.[163]

Before responding to these allegations, it should be noted that there is some irony in SED's attacks on Comcast's dealings with LSSi, because—as much as any evidence that Comcast has introduced into the record of this proceeding—the Comcast-LSSi litigation demonstrates Comcast's commitment to safeguarding its customers' information, even when that commitment exposes it to years of burdensome and costly litigation. Comcast sought to terminate LSSi's access to Comcast customer data because LSSi refused to identify to whom it was providing Comcast's customers' listing information.[164] That is exactly the sort of accountability that SED and its expert witness, Mr. Tien, have called for.

With that said, these are the statements by Mr. Miller—the Comcast employee who was the driving force behind Comcast's dispute with LSSi—that SED claims are "false if not misleading":

1. "I told [Ms. Donato] that kgb's source [of Comcast DL data] was LSSi. At the time I told that LSSi was in fact the exclusive source of Comcast's sourced DL data."[165]

[162] Tr. Comcast (Miller) at 593:20.
[163] This latter issue is addressed in more detail in section IV(D)(4)(d) *infra.*
[164] Exh. SED 5C (Christo), Att. F (Declaration of Phil Miller ¶ 8). As Mr. Miller has testified, Comcast's contract with LSSi precluded LSSi from licensing Comcast listings to third-parties other than directory publishers or directory assistance service providers without Comcast's express prior approval. LSSi, however, refused to comply with that restriction and so Comcast terminated the agreement with LSSi. Exh. Com 107/107C (Miller) at 8-11; Tr. Comcast (Miller) at 583-87, 601 (Oct. 3, 2014).
[165] SED Amended Opening Brief at 14 (quoting Exh.Com 107/107C at 13:10-11).

2. "I terminated that [kgb] contract on my own talking through with kgb when I learned in some discussion with them that they weren't using it for the intended purpose … they weren't using our records to support directory assistance calls."[166]

3. "All Directory Publishers that want access to Comcast's Subscriber Listing Information may purchase it from Targus on the same rates, terms and conditions, including on the same rates, terms and conditions as Comcast provides to itself… The data and information that LSSi would obtain from Targus would be the same data that Comcast's vendors (acting on behalf of Comcast) use to provide 411 directory assistance … The manner in which LSSi would obtain and use data from Targus would be the same way that Comcast's vendors would to provide these services to Comcast."[167]

We address each of SED's claims below in reverse order.

1. Mr. Miller's Statements Regarding LSSi were Truthful and Accurate.

SED alleges that Mr. Miller's statement in one of his declarations in the LSSi litigation (that "All Directory Publishers that want access to Comcast's Subscriber Listing Information may purchase it from Targus *on the same rates, terms and conditions*" – statement 3 above) is misleading because Comcast (through Targus—now Neustar) provided listings to kgb at a lower rate than it proposed charging LSSi.[168] SED's claim is based on a fundamental misunderstanding of the issues in the LSSi proceeding. To appreciate that misunderstanding, some background is required.

Although the Comcast-LSSi contract was executed in 2007, LSSi did not actually begin receiving Comcast listings until January 2010. Comcast sought to terminate the arrangement just a year later, because it had decided to use Neustar as its exclusive directory listing distribution

[166] SED Amended Opening Brief at 14 (quoting Tr. Comcast (Miller) at 576:16-577:1 (Oct 1, 2014)).
[167] SED Amended Opening Brief at 14 (quoting Exh. SED 5 (Christo), Att. K, Third Declaration of Phil Miller in *LSSi v. Comcast* ¶¶ 5-6).
[168] SED Amended Opening Brief at 17.

agent and because LSSi was in breach of the contractual provisions that limited the companies to which LSSi could license Comcast's listings.[169]

Comcast subsequently advised LSSi to contact, and work through, Neustar if it wished to continue receiving Comcast's listings.[170] In response, LSSi sought and obtained a preliminary injunction from the federal district court for the Northern District of Georgia, which required Comcast to continue providing LSSi the listings directly.[171] That injunction remained in place, over Comcast's objections, through 2012.

In granting the injunction, the court found that LSSi would likely be able to "prove that Comcast's provision of telephone numbers and listing information through Targus, a competitor of LSSi, is discriminatory access and is prohibited under 47 U.S.C. §§ 251(b)(3) and 222(e)."[172] The district court's order was based on two erroneous determinations – one factual, the other legal.

First, LSSi told the court that it was "a local exchange carrier [LEC] … a publisher of directories … [and] a provider of directory assistance data for local exchange carriers," and was, therefore, "entitled to receive" directory listing information from Comcast on a nondiscriminatory basis.[173] Those claims were subsequently deemed to be false by a federal district court in New York.[174]

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[169] Exh. Com 107/107C (Miller) at 8.
[170] *See* First Declaration of Phil Miller in *LSSi v. Comcast* ¶ 9 (Atta F to Exh. SED 5/5C (Christo))).
[171] *LSSI Data Corp. v. Comcast Phone, LLC*, 785 F. Supp. 2d 1356, 1360 (N.D. Ga. 2011) *vacated*, 696 F.3d 1114 (11th Cir. 2012). That is the reason, by the way, why the LSSi feed did not contain non-published listings. LSSi received its listings directly from Comcast via a different process than that used to provide listings to Neustar. *See* Comcast Opening Brief at 15, n. 65.
[172] *LSSI Data Corp. v. Comcast Phone, LLC*, 785 F. Supp. 2d 1356, 1360 (N.D. Ga. 2011) *vacated*, 696 F.3d 1114 (11th Cir. 2012).
[173] *LSSI Data Corp.*, 785 F. Supp. 2d at 1358.
[174] *See LSSi Data Corp. v. Time Warner Cable Inc.*, 892 F. Supp. 2d 489 (S.D.N.Y. 2012).

Second, as the Eleventh Circuit ruled in the appeal that Comcast brought challenging the injunction, even if LSSi were a LEC or a directory publisher, and therefore entitled to purchase listings (which was not the case), Comcast's use of Neustar as its agent was not per se discriminatory.[175]

The Court of Appeals therefore vacated the injunction and remanded the case to the district court to make the factual determination of whether Comcast, through Neustar, was providing nondiscriminatory service to eligible purchasers—i.e., LECs and directory publishers.[176] The issue was subsequently referred to the FCC for resolution.[177]

This history underscores why it was *not* impermissible for Neustar (on Comcast's behalf) to charge kgb and LSSi different rates. Because LSSi was neither a LEC nor a directory publisher, it was *not entitled* to non-discriminatory treatment under 47 U.S.C. §§ 222(e) or 251(b)(3). *More specifically, LSSi was not entitled to the same rates as kgb.* Thus, Mr. Miller's statement to the district court that "all Directory Publishers [and Directory Assistance service providers] that want access to Comcast's Subscriber Listing Information may purchase it from Targus on the same rates, terms and conditions …" was truthful and accurate.[178] LSSi was neither.[179]

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[175] *LSSi Data Corp. v. Comcast Phone, LLC*, 696 F.3d 1114, 1120-21 (11th Cir. 2012) (explaining that "Targus is not a LEC. Targus does not offer directory assistance or publish telephone directories. Targus is an agent of Comcast …. [Because] Targus is not a directory publisher, any differences between how Comcast provides directory listing information to Targus as compared to LSSi, would not violate § 222(e) …. or § 251(b)(3)").

[176] *Id.* at 1123.

[177] *LSSi Data Corp. v. Comcast Phone, LLC*, No. 11-cv-1246, 2013 U.S. Dist. LEXIS 188580 at *1-2 (N.D. Ga. Mar. 4, 2013).

[178] SED Amended Opening Brief at 17 (quoting Exh. SED 5/5C (Christo), Att. K (Third Declaration of Phil Miller ¶ 5)).

[179] In fact, SED's attempted reliance on the terms and conditions provided to kgb is doubly misguided, as SED has not demonstrated that kgb *itself* has a regulatory entitlement to Comcast's listings, and thus cannot rely on the kgb arrangement as a basis for demonstrating any supposed "discrimination," Among

SED also wrongly claims that the Court of Appeals' decision relied on Mr. Miller's declaration that Comcast was providing non-discriminatory treatment to LSSi.[180] To the contrary, the Court never addressed Mr. Miller's declaration, and specifically noted the absence of sufficient record evidence bearing on LSSi's discrimination claim, one way or the other.[181] Thus, Mr. Miller's declaration—which was truthful—was not a consideration in the court's decision. Indeed, that issue—LSSi's discrimination claim, and whether it could be proven as a factual and legal matter—was the very issue the court of appeals remanded back to the district court for determination (which handed it to the FCC, where it has been fully briefed and is currently pending).

2. Comcast's Termination of Its Contract with kgb Has No Bearing on Any Material Issue in This Case.

SED's second allegation is an attempt to cast doubt on Mr. Miller's explanation of the reason that Comcast terminated its contract with kgb pursuant to which Comcast (through Neustar) provided kgb with listings were for approximately one year.[182] Mr. Miller testified at the hearing that Comcast terminated its contract because it was not satisfied with the way that kgb was using Comcast's information.[183] SED, however, claims that this explanation is a pretext

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other things, SED has not provided any evidence that kgb operates as a directory publisher, a LEC, a provider of "call completion" services, or a directory assistance "agent" to a competing LEC. And there is certainly no evidence that kgb ever sought Comcast's listings under any claim of regulatory entitlement.

[180] SED Amended Opening Brief at 17 ("Mr. Miller's assertion of non-discrimination were misleading or false, and were material to the Eleventh Circuit's decision …").

[181] *LSSi Data Corp.,* 696 F.3d at 1123, n. 11 "[Comcast] did not provide any specifics about the terms of its agreement with Targus, or the terms on which Targus provides access to LSSi, kgb USA, or other directory assistance providers.")

[182] *See supra* at n. 86 (describing kgb's receipt of listings).

[183] Tr. Comcast (Miller) at 579:27-580:6 (Oct. 3, 2014).

and that the "real" reason Comcast terminated the kgb contract was to conceal the kgb arrangement from LSSi.[184]

Even if this theory made sense on its face, the simple truth is that Comcast has never concealed the existence of its arrangement with kgb from LSSi. To the contrary, the Comcast-kgb contract is a matter of public record in the LSSi litigation.[185] Indeed, the question of whether the Comcast-kgb arrangement somehow shows discrimination against LSSi is an issue in the remand proceeding (now pending at the FCC), as the Eleventh Circuit specifically noted:

> if the access Comcast provides (through Targus) to LSSi is not equal to the access Comcast provides (through Targus) to itself or its directory assistance provider, kgb USA, there would be a violation of § 251(b)(3). But as we have explained, the record now before us does not include sufficient information to support a finding that there is a substantial likelihood that LSSi would succeed with this claim.[186]

Assembling that record is an express part of the remand proceeding. SED can trust that LSSi has not failed to seek discovery of a relationship that is mentioned in Comcast's declarations to the district court, in its brief to the Eleventh Circuit, and seven times in the Eleventh Circuit's decision.

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[184] SED cites Mr. Miller's September 12, 2011, email to Mr. Clayton Lia Braaten (a Neustar executive) in support of this claim. SED Amended Opening Brief at 16. That email does say that the kgb agreement is being terminated "due to the 4/6 cent stuff going on …." However, regardless of what he told a business counter-part, Mr. Miller insists that he terminated the kgb arrangement because he was dissatisfied with kgb's performance and because he knew that kgb would continue to receive Comcast listings for the foreseeable future as a result of the LSSi litigation. (Tr. Comcast (Miller) at 579:27-580:6, Oct 3, 2014.) The discrepancy between the two explanations is irrelevant for the reasons explained above: LSSi was not entitled to the same rates as kgb, meaning that there was no cognizable discrimination and there was never any effort in the LSSi proceeding to "conceal" the existence of the Comcast-kgb relationship. Moreover, Mr. Miller was not obligated to tell Neustar why he did not want to continue doing business with kgb. Mr. Miller's decision not to tell Neustar the "real" reason in that 2011 email was Mr. Miller's business prerogative. It has no bearing on Mr. Miller's credibility as a witness in this proceeding.

[185] *LSSi Data Corp.,* 696 F.3d at 1118 ("According to Comcast, its own customers receive directory assistance services from a company called 'kgb USA,' and kgb USA will access Comcast's DALD from Targus at the same rates, terms, and conditions as all other directory assistance service providers").

[186] *Id.* at 1121-22.

3. Mr. Miller's Statements to Ms. Donato Were Also Accurate

Finally, there is no basis for SED's claim that Mr. Miller incorrectly told Ms. Donato that kgb's source for Comcast directory listing data was exclusively LSSi.[187] As discussed in greater detail below,[188] Mr. Miller accurately told Ms. Donato what the current source of the kgb listings was *at the time* Ms. Donato posed the question. He did not realize that she was also interested in knowing who the source for that data had been more than a year earlier.

H. COMCAST COOPERATED FULLY WITH SED'S INVESTIGATION

SED alleges a "veil of secrecy"[189] around Comcast's conduct in discovery and complains about so-called "information asymmetry" in this proceeding due primarily to the unremarkable fact that Comcast "knows their business better than CPUC staff does."[190] SED also implies that Comcast's reporting of the Release to the Commission is suspect because it occurred after Section 710 (SB 1161) became law. As explained below, neither allegation is valid.

1. SED's "Veil of Secrecy" Theory Is an Unfounded Conspiracy Theory.

SED's first basis for the "veil of secrecy" theory is that Comcast asserted the Electronic Communications Privacy Act ("ECPA") to protect its customers' personally identifiable information ("PII") from being further disseminated.[191] ECPA is a valid basis upon which to restrict access to customer PII[192] and, as it turns out, Comcast's concern about disclosing PII to SED was well-founded, as SED Investigator Momoh inadvertently released ninety-nine (99)

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[187] SED Amended Opening Brief at 14.
[188] *See, infra* § IV(D)(4)(d).
[189] SED Amended Opening Brief at 10-13.
[190] SED Amended Opening Brief at 10-13 ("veil of secrecy"), 19-21 ("information asymmetry").
[191] SED Amended Opening Brief at 10.
[192] *See* February 10, 2014, Motion of Comcast Phone of California and Related Entities for Adoption of Protective Order at 6. Notably, ECPA was also a basis accepted by the Sacramento District Court for keeping customer data confidential.

Affected Customers' email address and, in some instances, their names.[193] Notably, ECPA did not impede Comcast's delivery of relevant customer data to the AG because the AG and Comcast cooperated and stipulated to a court order providing the requisite legal process (including customer notice and an opportunity to be heard). Comcast also offered this option (obtaining customer records via a court order) to SED which rejected it.[194] In all events, ECPA ultimately did not foreclose SED's access to customer data since it (i) received much of the data it sought through the AG's office; (ii) received other customer data after obtaining customer consent;[195] and (iii) received still other data on an anonymized basis.[196] In a proceeding in which SED alleges that Comcast did not do enough to protect its customers' privacy, its complaints about respecting ECPA are hard to fathom.

Second, SED points to Comcast's designation of documents as confidential under GO-66, PU Code § 583,[197] and Comcast's attempt to comply with notice requirements in its confidentiality agreements with its vendors and other third parties.[198] But these actions are a legitimate—and indeed common—practice in Commission proceedings and in civil litigation.[199]

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[193] Tr. (SED) at 126:7-13 (SED stipulating that 99 customers' email addresses, many of which contained the customer name, were released by Mr. Momoh during SED's investigation).
[194] July 28, 2014, Comcast Reply Supporting Motion to Quash Second SED Deposition Notice at 2, n. 6. SED further suggests that Comcast's reliance on ECPA was somehow improper because it resulted in SED filing a motion to compel to obtain customer records. *See* SED Amended Opening Brief at 10, n. 33. But SED fails to acknowledge that it *withdrew* that motion.
[195] *See e.g.,* Exh. SED 2/2C (Momoh); Att. E. (re: Comcast Response to DR3.).
[196] *See e.g.,* Exh. SED 2/2C (Momoh); Att. H (Comcast Responses to DR 4-22-4:23.).
[197] *See* discussion of Comcast's reasons for designating documents as confidential at Motion for Protective Order at 3-7 (filed February 10, 2013).
[198] *See* SED Amended Opening Brief at 10-11 (complaining that Comcast invoked confidentiality protections). But SED also cites to a Senate Report that actually confirms that contracts like those Comcast has restrict the company from disclosing certain information. *See id.*, at 11, n. 35.
[199] *E.g.*, Cal. Uniform Trade Secrets Act §3426 *et seq*. "A court shall preserve the secrecy of an alleged trade secret by reasonable means which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any

In fact, at various points throughout this proceeding, both Comcast and SED *agreed* to designate responses to discovery as confidential to avoid slowing down the investigation[200] and more efficiently address the confidential designation of specific documents that either side actually planned to introduce. Moreover, Comcast's provision of the requisite notice under its commercial agreements to vendors and third parties is required by its contracts, a completely normal practice in the business world, and one that the Commission has recognized the necessity of in other dockets.[201] And there is no evidence in the record that such provisions ultimately prevented SED from gaining access to any documents or information that it sought in discovery or using the documents and evidence it wished in this proceeding.

2. SED's "Information Asymmetry" Theory is Equally Flawed.

SED's "information asymmetry" theory is grounded on the recognition that, in every Commission proceeding, "the utility knows their business better than CPUC staff does."[202] But that is necessarily the case in every investigation. And in any event, SED has failed to show how any such asymmetry uniquely hampered its investigation here.

SED issued and Comcast responded to over 300 data requests with hundreds of pages of narrative responses; Comcast provided SED more than 18,000 pages of documents; and SED conducted three full-day depositions to acquire the information it believes is relevant to this

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person involved in the litigation not to disclose an alleged trade secret without prior court approval." Cal. Civ. Code §3426.5.

[200] *E.g.,* Exh. SED 6/6C (Christo), Att. B, Exparte of Miller Deposition Transcript at 5:18-6:14 (agreeing to treat the entirety of the deposition transcripts as confidential; *see also* SED Motion to Compel at 2 (filed February 14, 2014) (noting that assurances agreed to between SED and Comcast regarding confidential treatment of documents in discovery); SED Motion to File Confidential Version of Post-Hearing Opening Brief (filed November 14, 2014) at 2 (noting "staff agreed to treat materials marked confidential by Comcast or Neustar under the aegis of § 583").

[201] *See, e.g.*, Rulings in Investigation No. 11-06-009 (AT&T and T-Mobile purchase and acquisition).

[202] SED Amended Opening Brief at 19.

proceeding.[203] This is in addition to the three full days of hearing.[204] Moreover, if SED's complaints about discovery were valid, the docket would be littered with motions to compel. Here, however, SED filed only *one* such motion—and later withdrew it.[205] In short, SED has presented no evidence to demonstrate it has been prejudiced in any substantive way in discovery.

SED also complains about issues over which Comcast had no control, including that SED had to subpoena the testimony of Neustar's Mr. Chudleigh.[206] SED omits critical facts here: (1) a subpoena was the only way the Commission could compel Neustar to participate in the hearing;[207] (2) Comcast has *no* control over Mr. Chudleigh testifying because he is not a Comcast employee;[208] (3) Neustar's own counsel negotiated Mr. Chudleigh's testimony with SED;[209] and (4) SED *agreed* to the parameters of Mr. Chudleigh's testimony.[210]

SED's complaints about "Commission resource constraints"[211] and the hearing time of fifteen (15) hours[212] similarly cannot be attributed to or held against Comcast. The fact is that *all* parties—including Comcast—were bound to the same set of Commission rules, procedures, and "constraints" of which SED complains. And SED's complaints are all the more puzzling because its frustrations were, in many instances, self-inflicted. For example, on the *first day* of hearing, SED requested an extended recess in order to make photocopies of one of its witness's

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[203] Comcast Opening Brief at 9-10; *see also* Exh. Com 102 (Munoz) at 12-13; *see also* Comcast Reply Supporting Motion to Quash SED Second Deposition Notice at 2.
[204] *See generally* October 1 to 3, 2014, hearing transcripts.
[205] *See generally* I.13-10-003.
[206] Tr. Neustar (Chudleigh) at 250:13-21 (Oct. 2, 2013). *Id*. at 248:27-28 to 249:1-7; *see also* Exh. Com 104/104C (Donato) Att. D (Chudleigh Declaration).
[207] *See generally* Staff Report and OII (Neustar is not named as a respondent).
[208] Exh. Com 104/104C (Donato) at Att. D ¶ 1 (Chudleigh Declaration).
[209] Tr. Neustar (Chudleigh) at 250:13-251:15 (Oct. 2, 2013) (Neustar counsel informing ALJ Burcham of the agreement between Neustar and SED regarding the parameters of Mr. Chudleigh's testimony).
[210] Tr. Neustar (Chudleigh) at 251:18 (Oct. 2, 2013) (SED counsel agreeing with Neustar counsel recitation of the parameters of Mr. Chudleigh's testimony).
[211] SED Amended Opening Brief at 21.
[212] SED Amended Opening Brief at 19-20.

testimony[213], and then SED spent much of the last day chasing down a red herring about the purportedly improper continued publication of "Ms. J's" listing on Ecolistings—when in fact the record ultimately established that "Ms. J" did not have and was not currently paying for non-published service.[214]

SED next posits that Comcast bears some responsibility for the fact that a number of the employees who worked on directory listing issues in 2009-2011 are no longer with the company.[215] Comcast was in no way responsible for the movements or exit of personnel who worked on an issue that started over *four years ago*.

And SED's dissatisfaction with the witnesses Comcast did present is unavailing. SED had the opportunity at hearing and/or in depositions to cross examine five Comcast witnesses.[216] Three of the witnesses (Mr. Munoz, Ms. Donato, and Ms. Stephens) had central roles in various aspects of investigating and responding to the Process Error.[217] Although not involved in the investigation, the fourth witness, Mr. Miller, played a role in developing Ecolisting and negotiating the business relationship between Comcast and Neustar, and the fifth witness, Ms. Cardwell was with the company for the relevant time period and had the responsibility of

[213] Tr. (SED) at 12:3-7 (Oct. 3, 2014) ("Your Honor, contrary to what I told you in the hall, we are still waiting for some photocopies of Mr. Momoh's testimony.")
[214] *See* Tr. at 610-614 (Oct.3, 2014) (discussing "Ms. J's" non-published status).
[215] SED Amended Opening Brief at 20. ("Another issue that implicates both information asymmetry and Comcast's credibility was the dearth of percipient witnesses.") SED even appears to suggest one Comcast employee, Ms. Cardwell, was transferred to avoid having to participate in the investigation. *Id.* As the deposition transcript of Ms. Cardwell shows, SED's own counsel confirmed that she was in fact present and involved in the first several months of investigation of the Process Error and was transferred temporarily to deal with the company's Superstorm Sandy recovery efforts. Exh. SED 5C (Christo) at Att. Z, Cardwell Deposition Transcript at 61:16-62:6.
[216] Comcast Motion to Confirm Close of Discovery at 4.
[217] Exh. Com 101/101C (Munoz) at 5; Exh. Com 103/103C (Donato) at 1; Exh. Com 105/105C (Stephens) at 3.

interacting with Neustar on certain directory listing issues.[218] In addition, SED also questioned Mr. Chudleigh at the hearing who was employed by Neustar (then Targus) during the entirety of relevant time period that Comcast was using Neustar as its directory listings agent.[219]

Finally, SED's claim that Ms. Donato had "no personal experience"[220] which resulted in "having to strike a *key portion* of her testimony" because she allegedly was not knowledgeable of certain "specifics"[221] blatantly mischaracterizes her testimony. Ms. Donato merely deleted one reference in her written testimony to the name of a provider that contributed listings to the proprietary "DLP" product owned by Neustar,[222] and replaced that name with "National Provider X"[223] due to subsequent understanding that Neustar had not received consent from National Provider X to disclose its name.[224]

IV. LEGAL ISSUES

A. THE COMMISSION LACKS JURISDICTION TO FIND ANY LIABILITY OR IMPOSE ANY PENALTIES UNDER SECTION 710

As Comcast showed in its Opening Brief,[225] Section 710 flatly prohibits this investigation and precludes any finding of a legal violation or imposition of a penalty because "[t]he commission shall not exercise regulatory jurisdiction or control over Voice over Internet

[218] Exh. Com 107 (Miller) at 2-3.
[219] Exh. Com 104/104C (Donato) at Att. D ¶¶ 1-3; *see also* Tr. Neustar (Chudleigh) at 254:17-23 (Oct. 3, 2014).
[220] SED does not explain what Ms. Donato did not have personal experience about. SED Amended Opening Brief at 20.
[221] SED Amended Opening Brief at 20 (citing Tr. at 429:26-28) (emphasis added).
[222] Tr. Comcast (Donato) at 429:26-28 to 430:1-22 (Oct. 3, 2014).
[223] Tr. Comcast (Donato) at 421:1-10 (Oct. 3, 2014).
[224] Tr. Comcast (Chudleigh) 285:19-27 (Oct. 2, 2013) (confirming confidentiality agreement).
[225] Comcast Opening Brief at 25-28; *see also* Comcast Mot. to Dismiss; Reply of Comcast Phone of California, LLC (U 5698 C) and Related Entities to Responses to Mot. to Dismiss (filed Dec. 20, 2013) ("Reply Supporting Motion to Dismiss").

Protocol … services,"[226] and this proceeding seeks to do exactly that. Contrary to SED's protestations, this proceeding is about VoIP services.

As a threshold matter, as Comcast has explained, SED cannot circumvent the statutory prohibition on VoIP regulation by claiming that its "hook" is presented by Comcast Phone's provision of a regulated wholesale interconnection service to Comcast IP. All VoIP service necessarily includes an integral interconnection component, and this theory would thus provide a complete end run around the legislative prohibition. SED now seeks to push this theory even further, and support authority over core aspects of the VoIP end user offering—specifically, the charges imposed on the end user customers for non-published service and disclosures to those customers.[227] SED's effort to seek injunctive relief compelling action with respect to certain core aspects of the VoIP service (e.g., notification to VoIP customers) on a going-forward basis clearly goes well beyond the limits of the already-strained theory of jurisdiction that SED advanced – and the Presiding Officer incorrectly accepted – of indirect jurisdiction via interconnection oversight.

1. Section 710 Forecloses this Proceeding

As Comcast demonstrated in its Motion to Dismiss and post-hearing Opening Brief, Section 710 bars this proceeding. SED does not dispute that:

- Section 710 bars the Commission from exercising regulatory jurisdiction or control over VoIP services;
- The non-published listings inadvertently released were for Comcast IP's XFINITY Voice service;[228]

[226] PU Code § 710(a).
[227] *See* SED Amended Opening Brief at 95 (asserting claim under PU Code § 451 for charges billed to customers for non-published service and for alleged deficiencies in customer disclosures).
[228] *See* Comcast Opening Brief at 1.

- XFINITY Voice is a VoIP service under the PU Code;[229] and
- The VoIP listings are part and parcel of Comcast's VoIP offering.[230]

Where, as here, the Commission is proposing to find violations of the law and impose fines arising out of a release of VoIP listings—listings that are part and parcel of the VoIP offering—the Commission is unquestionably asserting its "regulatory jurisdiction or control over [VoIP] services."[231] Section 710 flatly prohibits this. Accordingly, this proceeding must be dismissed for lack of jurisdiction.

2. SED's and Intervenors' Various Efforts to Avoid Section 710 are Unavailing

a. *SED Cannot Evade Section 710 by Relying on the Commission's General Authority over Comcast Phone or on Theories of Alter Ego and Accessory Liability*

The plain text of Section 710(a) prohibits the Commission from regulating VoIP and IP-enabled *services*—without regard to what entity provides those services or whether that entity is (or is not) regulated by the Commission. Moreover, the specific command of Section 710 not to regulate VoIP *services* overrides the general authority the Commission has to regulate Certificates of Public Convenience and Necessity ("CPCNs").[232] Thus, notwithstanding the Commission's broad power to regulate public utilities, such power "*does not authorize disregard by the commission of express legislative directions* to it, or restrictions upon its power found in other provisions of the [Public Utilities Code] or elsewhere in general law."[233]

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[229] *See* Mot. to Dismiss Reply at 8-10. Indeed, the Commission has previously acknowledged that "[a]ll Comcast's voice customers are now served by the company's brand of VoIP." *OIR to Require Interconnected VoIP Service Providers to Contribute to the Support of the California's Public Purpose Programs*, Rulemaking 11-01-008, at 7.
[230] *See* Mot. to Dismiss Reply at 5-6.
[231] PU Code § 710(a).
[232] *See infra* n. 254 (citing law that the specific controls over the general in statutory construction).
[233] *Assembly of the State of Cal. v. Pub. Util. Comm'n*, 12 Cal. 4th 87, 103 (1995) (emphasis added).

The legislative history confirms that Section 710 is intended to address regulation of VoIP *services* (whether or not the provider of the services is a CPCN holder). During consideration of the bill, interconnected VoIP services were described as being offered both by "a cable company (*i.e.*, Comcast's Digital Voice)" and "*a local exchange carrier* (*i.e.*, AT&T's U-verse or Verizon's FiOS)."[234] The Legislature was thus well aware that several entities with CPCNs (*e.g.*, AT&T, Verizon, and Frontier) offer both traditional landline service and IP-enabled service. Rather than focusing Section 710 on the *status* of the service provider, the statute was deliberately structured to focus on the *nature of the service*.[235] To that end, the Legislature chose to adopt the following recommendation to strike the word "providers":

> 710(a). The commission shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol enabled service ~~providers~~ except as expressly directed to do so by statute or as set forth in subdivision (c).[236]

As a result, SED's focus on Comcast Phone's alleged role as a holder of a CPCN[237] is beside the point. Section 710 focuses on the nature of the service—here, VoIP—*not* the regulatory classification of the service provider.[238] Further, general provisions of the PU Code providing the Commission with jurisdiction over public utilities cannot overcome the specific

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[234] Senate Energy, Utilities and Communications Committee, analysis SB 1161 (2011-2012 Reg. Sess.) as amended March 26, 2012 (Hearing April 17, 2012) at 3 (emphasis added).
[235] Senate Energy, Utilities and Communications Committee, analysis of SB 1161 (2011-2012 Reg. Sess.) as amended March 26, 2012 (Hearing April 17, 2012) at 7 (the "bill only prohibits state regulation of VoIP and other IP-enabled *services*.") (emphasis added).
[236] Senate Energy, Utilities, and Communications Committee, analysis of SB 1161 (2011-2012 Reg. Sess.) as amended March 26, 2012 (Hearing April 17, 2012) at 8. While the enacted version of section 710(a) was slightly different, it also did not include the word "providers."
[237] *See* SED Amended Opening Brief at 88 (asserting that the Release "resulted from" Comcast Phone's role).
[238] Of course, the analysis is different when the question is not whether the Commission *has jurisdiction* but instead whether it *can establish a substantive violation of the law*. Under PU Code Section 2891.1, for example, it is critical that the entity alleged to have violated that provision is a regulated telephone corporation.

statutory prohibition concerning VoIP services.[239] Thus, it is irrelevant whether—*but for* Section 710—the Commission could take enforcement action against Comcast Phone insofar as it holds a CPCN from the Commission.[240]

For the same reasons, SED cannot avoid the jurisdictional bar by asserting that Comcast Phone's "[r]elated [e]ntities" (including Comcast IP) all acted "as one unified entity" and therefore can be held liable under theories of "alter ego" and accessory liability.[241] Even if SED could establish the prerequisites for such liability—a burden it cannot carry, as demonstrated below[242]— the fact remains that Section 710 prohibits the "exercise [of] regulatory jurisdiction or control over [VoIP] *services*," regardless of the status of the service provider. Because Section 710 bars the Commission from investigating and taking enforcement action against Comcast Phone as *it pertains to the provision of VoIP services*, the Commission likewise cannot take the same action against "related" entities under theories of alter ego or accessory liability.

b. *SED's Interconnection Argument is Flawed.*

SED renews its argument—accepted by the Presiding Officer in the prior ruling on Comcast's motion to dismiss ("MTD Ruling")—that this proceeding has nothing to do with the

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[239] *See Lake v. Reed*, 16 Cal. 4th 448, 464 (1997) ("a more specific statute controls over a more general one"); *see also* Cal. Code Civ. Proc. section 1859 ("when a general and particular [statutory] provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.").

[240] Even when a regulated telephone corporation offers an unregulated service, the Commission has acknowledged that it lacks jurisdiction over the unregulated *service*. For example, the Commission has acknowledged that it does not regulate internet access services even when provided by a regulated telephone corporation that holds a CPCN because it does not have jurisdiction over internet access services (which are information services, not telecommunications services). *See In the Matter of the Joint Application of AT&T Corp., Meteor Acquisition Inc., and MediaOne Group, Inc. for Approval of the Change in Control*, 2000 Cal. PUC LEXIS 355 (May 4, 2000).

[241] *See* SED Amended Opening Brief at 85-88. SED's brief refers to "vicarious or alter ego liability," but presumably means only the latter. Vicarious liability only applies to an employer's liability for the acts of its employee.

[242] *See* Section IV(D)(2), *infra* [*Section 2891.1 argument subsection (c*)]

VoIP service that Comcast IP provides to the residential customers whose non-published numbers were inadvertently released.[243] Instead, according to SED, "section 710 does not apply here because ... the alleged privacy violations resulted from Comcast Phone's provision of *telecommunications services* [i.e., the interconnection service that Comcast Phone provides to Comcast IP] pursuant to its CPCN."[244]

As Comcast has shown, if SED were correct that the Commission would avoid Section 710 simply by purporting to regulate the interconnection element of VoIP services, Section 710 would be meaningless.[245] Section 239 defines a VoIP service as one in which users may receive calls from or send them to the public switched telephone network ("PSTN") and thus, VoIP services *always* require interconnection with a regulated "telephone corporation" to the PSTN.[246] Allowing the Commission to exercise jurisdiction over a VoIP service wherever a regulated entity provides "interconnection" as a part of the service would eviscerate Section 710. And, as Comcast has explained, it would violate a cardinal rule of statutory interpretation—that "[w]e do not examine [statutory] language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment."[247] Here, however, SED's proposed interpretation renders inexplicable the Legislature's decision to include explicit carve-outs from Section 710's prohibition on VoIP regulation for certain specified aspects of VoIP and IP-enabled services (such as battery backup

[243] SED Amended Opening Brief at 88.
[244] SED Amended Opening Brief at 88 (emphasis added).
[245] Comcast Mot. to Dismiss Reply at 7.
[246] *See* PU Code Section 239(a)(1)(C) (VoIP definition includes requirement that service "[p]ermits a user generally to receive a call that originates on the public switched telephone network and to terminate a call to the public switched telephone network."). Section 239 thus contemplates that VoIP calls may be made from or to the PSTN—which by its nature, requires interconnection with a telecommunications carrier.
[247] *See, e.g.*, *O.W.L. Found. v. City of Rohnert Park*, 168 Cal. App. 4th 568, 589 (2008).

disclosures, E911, and PUC surcharges).[248] If the Legislature had intended to allow broad Commission regulation of core aspects of a VoIP service offering through jurisdiction over VoIP's integral reliance on regulated interconnection, , it would not have expressly preserved the Commission's narrow authority to regulate those specifically enumerated aspects of VoIP and IP-enabled services. In short, SED's theory is manifestly contrary to the legislative intent to "reaffirm California's current policy of regulating internet-based services *only as specified* by the Legislature."[249]

SED also fails to come to grips with the Commission staff's own recognition that Section 710 bars the exercise of regulatory jurisdiction or control with respect to the VoIP listings release at issue here. As Comcast noted in its Opening Brief, the Commission's Consumer Affairs Branch told customers who complained about the Release that it was unable to assist them because "[t]he Commission does not have jurisdiction over … Voice Over Internet Protocol (VOIP)."[250] SED's brief does not even mention—let alone attempt to explain—this confirmation of what Comcast has argued from the beginning of this proceeding.

c. *SED Arguments Illustrate How Strained and Limitless its Theory of Jurisdiction is*

For the first time, in its post-hearing brief, SED makes clear its theory that the Commission's oversight of Comcast Phone's provision of wholesale interconnection service indirectly allows the Commission to regulate *core aspects of the VoIP retail service* at issue in this case. Under SED's logic, the Commission can, for example, subject Comcast to liability for

[248] PU Code § 710(c). Conversely had the Legislature intended for the Commission to have jurisdiction over VoIP directory listings, it would have included directory listings within the enumerated exceptions in Section 710 (c).
[249] SB 1161, section (1)(b) (emphasis added).
[250] *See* Comcast Opening Brief at 27-28 (quoting Exh. Com 101/101C (Munoz) at 9 and Att. A).

charges imposed on its end-user VoIP customers for non-published service and for disclosures to those customers about the nature of that service.[251] And, according to SED, the Commission may impose injunctive relief compelling action with respect to other core aspects of the VoIP service (including compelled notification to VoIP customers about the nature of VoIP service).[252]

This is compelling evidence that SED's theory of jurisdiction (which uses "interconnection" as a hook) has no limiting principle and would give the Commission *carte blanche* to regulate all aspects of VoIP. As shown above, SED's interconnection theory cannot be reconciled with Section 710. Thus, *a fortiori*, prohibitions reaching further into the retail aspects of the VoIP service are flatly prohibited by Section 710.

Because the interconnection theory SED previously advanced does not justify regulation of these core aspects of the VoIP service (and SED makes no argument to the contrary), these attempts to "exercise regulatory jurisdiction or control" over VoIP services should be rejected as contrary to Section 710.

d. *Intervenors Are Wrong in Asserting that the Release of VoIP Listings Does Not Involve VoIP Service.*

In an argument that SED notably does not join, the Intervenors alone contend that the Release of VoIP non-published listings does not involve an aspect of VoIP service because the listings themselves do not meet the statutory definition of VoIP.[253] Under their flawed logic, the Commission is free to regulate any action a provider takes as part of its VoIP offering that does not itself involve making a VoIP call.

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[251] *See* SED Amended Opening Brief at 98-99 (asserting claim under PU Code § 451 for charges billed to customers for non-published service and for alleged deficiencies in customer disclosures).
[252] *See* SED Amended Opening Brief at 119, 121-123 (seeking order compelling Comcast to provide certain disclosures and opt-out mechanisms with respect to published and non-published numbers, including for VoIP service).
[253] *See* Intervenors' Brief at 17-18.

This argument overlooks the central fact that VoIP listings are part and parcel of Comcast IP's VoIP service offering. It is undisputed that the listings are for Comcast's VoIP service (XFINITY Voice),[254] and the listed phone number for XFINITY Voice is *always* provided with (and must be used in conjunction with) the VoIP service.[255] XFINITY's directory listings is not a stand-alone service and cannot be purchased as a separate service apart from the XFINITY Voice service offering.[256] Indeed, it would be nonsensical for a customer to have bare directory listings without any associated voice service. Accordingly, any effort by the Commission to regulate the process by which Comcast IP provides directory services to its XFINITY Voice customers entails the "exercise [of] regulatory jurisdiction or control over" the inextricably associated "Voice over Internet Protocol … service[]."[257] This attempted regulation plainly runs afoul of the statute.

Under Intervenors' reasoning, Section 710 would bar the Commission from regulating only the actual provision of interconnected *VoIP calls*—but nothing else, including features adjunct to VoIP services (such as voicemail, call waiting, and call forwarding). "Such a result," however, "violates the rule of construction that a statute is to be interpreted to avoid rendering

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[254] Exh. Com 101/101C (Munoz) at 9-10 and n. 4 (noting that the FCC has also characterized Comcast's Digital Voice Service as a VoIP service and "[i]t is the XFINITY Voice subscribers whose Non-Published Listings were inadvertently published as a result of the Process Error and who are the Affected Customers.")

[255] Exh. Com 101/101C (Munoz) at 13 (under the LIS Agreement, Comcast Phone also provides "10-digit telephone numbers" to Comcast IP, which further enables Comcast IP to "provide interconnected VoIP service to [Comcast IP's] Subscribers.")

[256] Exh. Com 103/103C (Donato) at 5 ("Listings are part and parcel of the XFINITY Voice service offering, as evidenced by how Comcast offers and provides the listings. Comcast does not offer retail residential directory listings as a separate service from XFINITY Voice service nor does Comcast provide published, non-published or non-listed directory listings as a stand-alone service. It is my understanding that this is a common industry practice.") *See also* http://www.comcast.com/corporate/about/phonetermsofservice/comcastdigitalvoice/cdvrstatepricing.html (Comcast price lists for California reflect that a non-published directory listing are offered as a feature of the XFINITY Voice monthly service per line).

[257] PU Code Section 710(a).

terms meaningless or superfluous."[258] As shown above, this would render redundant the express carve-outs in Section 710(c) from the prohibition on VoIP regulation for certain aspects of VoIP and IP-enabled services, such as E911 and backup power systems requirements.[259] In short, Intervenors' argument should be rejected.

e. *Section 710 Operates Prospectively to Bar Investigation and Enforcement Action In this Proceeding.*

SED appears to renew its contention (tentatively raised in the OII) that Section 710 can be ignored because the Release occurred before that statute was enacted and applying the statute here would supposedly involve an impermissibly retroactive application of the law against the Commission.[260] As Comcast explained in its motion to dismiss, this argument is fundamentally flawed.

First, SED mistakenly presumes that Comcast's position relies on applying Section 710 retroactively because the Release occurred prior to the law's enactment.[261] As the California Supreme Court explained, however, a law "is not made retroactive *merely because* it draws upon

[258] *O.W.L. Found.*, 168 Cal. App. 4th at 590.
[259] *See* PU Code § 710(c) (stating that "[t]his section does not affect or supersede … [t]he Commission's authority to enforce" various enumerated statutes or requirements, including, *inter alia*, "requirements regarding backup power systems" and "[t]he Warren-911-Emergency Assistance Act").
[260] *See* SED Amended Opening Brief at 83-84; *see also id.* at 82 (emphasizing that Section 710 "became effective on January 1, 2013, *after* the privacy breach and its repair.") (emphasis in original).
[261] In ruling on Comcast's motion to dismiss, the Presiding Officer similarly misconstrued Comcast as arguing that the Commission's investigation involves a retroactive application of Section 710. *See* MTD Ruling at 14 ("Comcast claims that the Commission is precluded from conducting the current investigation because it would be doing so by retroactive application of section 710."). That is almost exactly *the opposite* of what Comcast was arguing. Comcast was responding to *SED's argument*—renewed here—that Section 710 cannot apply to foreclose this investigation because doing so would involve a retroactive application of that provision. *See* Comcast Mot. to Dismiss at 19-21. Thus, this aspect of the MTD Ruling undercuts (rather than supports) SED's argument. Indeed, the MTD Ruling noted Section 710's "forward-looking" impact.

facts existing prior to its enactment."[262] For example, laws that govern procedure, such as the conduct of trials, are "*prospective* in nature since they relate to the procedure *to be followed in the future*" —even if the underlying civil or criminal *conduct took place prior to the law's enactment*.[263] Section 710 is unquestionably a procedural law that limits the Commission's jurisdiction and conduct on a *going-forward basis* (*i.e.*, bars the agency from undertaking the OII and future enforcement action). Thus, concluding—correctly—that Section 710 bars this investigation and enforcement action does not involve any retroactive application of the law.[264]

Even if Comcast were asking for Section 710 to operate retroactively (and it is not), there is no *impermissible* retroactivity here. The decisive factor in determining whether a law is impermissibly retroactive is whether it "change[s] the legal consequences of past conduct" by "imposing new or different *liabilities*."[265] A law is improperly "retroactive" if it defines past conduct as a crime, increases the punishment, or deprives a defendant of a defense on the merits based on the past conduct.[266] Laws that eliminate liability or reduce sentencing for certain crimes, on the other hand, are not improperly retroactive and are thus properly applied to pending cases. In this case Section 710 does not impose any new or different liabilities on any party, and thus cannot be impermissibly retroactive. For example, the law does not expose

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[262] *Tapia v. Superior Court*, 53 Cal. 3d 282, 288 (1991) (emphasis added; citation omitted); *Strauch v. Superior Court*, 107 Cal. App. 3d 45, 49 (1980); *Elsner v. Uveges*, 34 Cal. 4th 915, 936 (2004).
[263] *Tapia*, 53 Cal. 3d at 288 (emphasis added).
[264] Even if the Commission had adopted the OII before section 710 was enacted, its enactment would still have barred the Commission from further investigating and adjudicating the Release and the OII would have had to have been dismissed. *See Younger v. Superior Court*, 21 Cal. 3d 102 (1978) (statute divesting the courts of authority to address petitions to destroy former records of marijuana conviction and giving such authority to the Department of Justice "effectively repealed" the former law, and the court had no jurisdiction to address the case on appeal); *Bruner v. U.S.*, 343 U.S. 112, 116-17 (1952) (holding that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, *all cases fall with the law*") (emphasis added).
[265] *Tapia*, 53 Cal. 3d at 288, 291 (emphasis added).
[266] *Elsner v. Uveges*, 34 Cal. 4th at 937; *Myers v. Philip Morris* Cos., 28 Cal. 4th 828, 839 (2002); *Strauch*, 107 Cal. App. 3d at 48-49; *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994).

Comcast to greater liabilities; rather, it prospectively limits the *Commission's* jurisdiction. Moreover, Section 710 merely clarified and affirmed the *Commission's* existing legal framework of not regulating VoIP as a traditional utility service.[267] A "statute that merely *clarifies*, rather than changes, existing law" is properly applied to transactions pre-dating its enactment.[268]

f. *SED Does Not Even Argue, Much Less Establish, that the Commission May Enforce as "Laws of General Applicability" the PU Code and Other Provisions on Which SED Relies.*

As Comcast acknowledged in its motion to dismiss, Section 710 contains a narrow exemption that allows the Commission to enforce certain laws "of general applicability," such as the generally applicable consumer protection statutes enumerated in Section 710(d) -- assuming of course that the *Commission has authority to enforce such laws*.[269]

Significantly, SED does not even attempt to make the case that the grab-bag of statutory provisions in which it attempts to anchor the *Commission's* jurisdiction are such laws of general applicability.[270] This argument is therefore waived and is not properly before this Presiding Officer.

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[267] *See, e.g.*, Senate Energy, Utilities and Communications Committee, analysis of SB 1161 (2011-2012 Reg. Sess.) as amended March 26, 2012, (Hearing April 17, 2012) (confirming that Section 710 was intended to preserve the status quo); *see also* n. 299, *infra* (discussing pre-enactment Commission decisions declining to regulate VoIP).

[268] *W. Sec. Bank v. Superior Court*, 15 Cal. 4th 232, 243 (1997).

[269] Section 710(d) states that "[t]his section does not affect the enforcement of any state or federal criminal or civil law or any local ordinances of general applicability," including (but not limited to) various specified statutes, such as "consumer protection and unfair or deceptive trade practices laws or ordinances." PU Code § 710(d).

[270] SED does summarily note the MTD Ruling's "find[ing] that the California *Constitution's* privacy provisions at issue are in fact laws of 'general applicability,' and therefore excluded from the regulatory prohibitions of [Section 710.]" SED Amended Opening Brief at 84 (emphasis added). But that single sentence in SED's 120-page brief says nothing about the *statutory* provisions relied on here (including PU Code Sections 2891, 2891.1, and 451). And the MTD Ruling never specifically held that those provisions are laws of general applicability. For these reasons, as noted above, any argument to that effect is waived.

In any event, the three key PU Code Sections on which SED relies are clearly not the sort of laws of general applicability (*e.g.*, consumer protection laws applicable to *all* persons) to which the narrow exemption in Section 710(d) applies. To begin, neither SED nor the MTD Ruling contests Comcast's prior showing that Section 710 requires an express statement authorizing Commission jurisdiction over VoIP services, and exceptions to the broad prohibition on VoIP regulation must be narrowly construed.[271] Indeed, this follows inexorably from the statute's command that regulation of VoIP is permitted *only* when the exercise of regulatory jurisdiction is "required or *expressly* delegated by federal law or *expressly* directed … by statute or as set forth in subdivision (c)."[272] The legislature would not have twice repeated the requirement for an "express[]" statutory grant of authority if it intended the concept of laws of "general applicability" to be broadly construed. For that reason, the cases cited in the MTD Ruling addressing the concept of a law of general applicability in other contexts far removed from Section 710 (such as labor relations) have no bearing here.[273]

Simply put, provisions of law that solely apply to telephone corporations[274] or public utilities[275] cannot be the sort of laws of general applicability to which Section 710(d)'s narrow exemption refers.[276] Any other conclusion would lead to the absurd result that the Commission could enforce *the entire PU Code*—which, unsurprisingly, applies only to public utilities—with

[271] *See* Comcast Mot. to Dismiss at 10-12.
[272] PU Code § 710(a) (emphasis added).
[273] *See* MTD Ruling at 16-17.
[274] *See, e.g.*, PU Code §§ 2891, 2891.1.
[275] *See, e.g.*, PU Code § 451.
[276] SED also cites provisions of the Business & Professions Code, which is arguably a law of general applicability. *See* SED Amended Opening Brief at 100-101. But SED concedes it does not have the authority to enforce those provisions, and it therefore cannot evade the jurisdictional bar in Section 710 on that basis.

respect to VoIP services without running afoul of Section 710.[277] Needless to say, this interpretation (like SED's other interpretations of the statute) would not only render Section 710 a dead letter, it would also perversely mean that Section 710 affirmed the PUC's regulation over VoIP services as utility services—even though the legislative intent is clearly to the contrary.[278]

B. SED HAS FAILED TO ADDRESS, MUCH LESS REFUTE, COMCAST'S SHOWING THAT THE COMMISSION LACKS JURISDICTION TO ENFORCE THE CONSTITUTIONAL RIGHT TO PRIVACY.

Even if the right to privacy recognized in Article I of the California Constitution is a law of general applicability, as the MTD Ruling held,[279] neither SED nor the MTD Ruling explains how the Commission has jurisdiction to enforce a freestanding constitutional privacy right.[280] Comcast demonstrated in its motion to dismiss and its post-hearing Opening Brief that, while the Commission may enforce the "Public Utilities" article (Article XII) of the California Constitution, it has no power to enforce privacy rights (or, for that matter, any other constitutional rights) contained in Article I of the Constitution.[281] SED has waived any argument to the contrary.

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[277] *But see O.W.L. Found.*, 168 Cal. App. 4th at 589 (court must reject interpretation that would lead to absurd results).

[278] The express purpose of the legislation is to "reaffirm California's current policy of regulating internet-based services *only as specified* by the Legislature." SB 1161, section (1)(b) (emphasis added). The legislative history acknowledges that the "CPUC has never regulated VoIP or IP-enabled services like traditional telephone service," and states that the bill was designed to ensure that California adheres to the longstanding (state and federal) policy of "preserv[ing] the vibrant and competitive free market" for internet and other interactive computer services. Senate Energy, Utilities and Communications Committee, analysis of SB 1161 (2011-2012 Reg. Sess.) as amended March 26, 2012, (Hearing April 17, 2012) at 6.

[279] *See* MTD Ruling at 17.

[280] SED baldly asserts that the Commission "can enforce the California Constitution as a law of general applicability." SED Amended Opening Brief at 93. But SED makes no effort to explain how it can do so given that PU Code Section 2101 authorizes the Commission to enforce only constitutional and statutory provisions "affecting public utilities"—and not, as it contends, generally applicable provisions like the right to privacy in Article I of the California Constitution

[281] *See* Comcast Opening Brief at 28-31.

In any event, it is unsurprising that the Commission lacks jurisdiction to enforce a freestanding constitutional right to privacy—a right not contained in the article of the Constitution addressing "Public Utilities." As SED recognizes, the Commission already has jurisdiction to enforce what SED characterizes as "the codification of the California Constitution's privacy protections"—*i.e.*, PU Code Section 2891.1.[282] It is unclear why the Commission would need additional enforcement powers to bring action directly under the state Constitution. One thing is clear, however: the Commission does not have that authority and has not shown otherwise. The constitutional privacy claim, therefore, must be dismissed for lack of jurisdiction.

B. ANY FINDING OF LIABILITY OR IMPOSITION OF PENALTIES WOULD VIOLATE DUE PROCESS AND THE PU CODE.

Even if Section 710 did not bar this proceeding, the Commission could not impose liability here for conduct involving the provision of a never-before-regulated VoIP service.[283] The Commission has never declared VoIP services to be a regulated telephone service. Quite the opposite—it has *declined* to take any regulatory action with respect to VoIP services even before Section 710 was enacted.

As early as 2006, the Commission explained that it would be premature to attempt to regulate VoIP services "[s]ince the FCC has determined that it is charged with [selecting the appropriate regulatory framework for VoIP] and is exercising its authority."[284] Since then, the

[282] *See* SED Amended Opening Brief at i.
[283] *See* Comcast Mot. to Dismiss at 4-5.
[284] *OII to Determine the Extent to which the Public Utility Telephone Service Known as VoIP Should be Exempted from Regulatory Requirements*, D.06-06-010, *mimeo* at 3; *see also id.*, *mimeo* at 5 ("we have not found an immediate need to address VoIP consumer protection issues."); *OIR into the Service Quality Standards for All Telecommunications Carriers*, D.09-07-019, n. 28, *mimeo* at 12 (stating that "[s]hould the FCC define the role of state commissions over VoIP, the Commission will determine the applicability

Commission has consistently declined to exercise jurisdiction over VoIP services and notably has never conducted a proceeding resulting in a final, appealable order finding that VoIP services are a regulated "telephone service" or that it may exercise jurisdiction over this unclassified service.[285]

Fundamental principles of constitutional due process require that an entity be given fair notice of the law before it may be held liable for any violation—and certainly before any penalty is imposed for a violation.[286] In a similar vein, the PU Code requires the Commission to give notice and provide opportunity to be heard prior to modification of the Commission's prior decisions.[287] Here, Comcast had no notice that the Commission was effectively modifying its position on VoIP services in D.06-06-010 such that Comcast could be liable for allegedly violating provisions of the PU Code and California Constitution arising from *conduct involving a*

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of its service quality standards at that time."). To date, the FCC has not classified VoIP as a common carrier service subject to public utility regulation. *See, e.g., In re IP-Enabled Services,* Report and Order, 24 FCC Rcd. 6039, 6043, n.21 (2009) ("The Commission to date has not classified interconnected VoIP service as a telecommunications service or information service as those terms are defined in the Act, and we do not make that determination today.").

[285] *See* CPUC Resolution ALJ-215, *mimeo* at 3 (dismissing on appeal a slamming citation against Time Warner Cable Information Services, a provider of VoIP services); *OIR into Reliability Standards for Telecommunications Emergency Backup Power Systems,* D.08-09-014 (declining to revisit decision about whether to leave VoIP services unregulated); *Faridi v. Time Warner Cable Information Services,* D.09-05-033, *mimeo* at 2 (dismissing a complaint against Time Warner's cable/VoIP service on basis that "we have not asserted jurisdiction over TWC and TWC Digital for consumer complaints"); D.06-06-010, *mimeo* at 5 ("we have not found an immediate need to address VoIP consumer protection issues."). Although a 2011 CPUC decision *commencing a rulemaking* "tentatively conclude[d]" that VoIP service providers were "telephone corporations" for the limited purpose of imposing surcharges on such services, (s*ee* OIR 11-01-008, *mimeo* at 27-28), the Commission's *final decision* did not adopt that conclusion (as the Legislature passed a law specifically authorizing the Commission to impose surcharges on VoIP services). *See OIR to Require Interconnected VoIP Service Providers to Contribute to the Support of California's Public Purpose Program,* D.13-02-022; PU Code § 285. Indeed, the Commission's final decision in Rulemaking 11-01-008 rejected the Consumer Protection and Safety Division's ("CPSD")—the prior name for SED, request to apply consumer protection rules to VoIP providers, finding that the recently enacted Section 710 "effectively resolved all of the matters" in SED's request. D.13-02-022, *mimeo* at 4.

[286] *See FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317-19 (2012).

[287] *See* PU Code § 1708.

VoIP service. As a result, any imposition of a penalty here—or even a bare finding of a violation of the law[288]—is barred by the Due Process Clause of the Fourteenth Amendment and the PU Code.

C. SED HAS FAILED TO CARRY ITS BURDEN IN ESTABLISHING THAT ANY COMCAST ENTITY VIOLATED ANY LAWS

Apart from the insurmountable jurisdictional obstacles to this proceeding, SED's claims fail on the merits. As we explain below, much of SED's 124-page brief consists of sheer surmise, conjecture, and overheated rhetoric.[289] Because SED has failed to carry its burden of establishing each element of each claim by a preponderance of evidence in the record, all of its claims should be dismissed and this proceeding closed.

1. SED Has Failed to Demonstrate that Comcast Violated the Constitutional Right to Privacy

In citing the *Hill v. NCCA* case addressed in Comcast's Opening Brief, SED makes clear that it purports to assert a claim for violation of the right to privacy under Article I of the California Constitution.[290] Leaving aside the jurisdictional flaw in this theory, discussed above, SED fails to even allege (much less establish) a critical element of this claim—that the Release was so serious as to "constitute an egregious breach of the social norms underlying the privacy right."[291] On that ground alone, the claim should be dismissed.

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[288] *See Fox*, 132 S. Ct at 2319-20 (even though no penalty was imposed, the FCC's determination that regulated company violated the law was unconstitutional for lack of fair notice).
[289] *See, e.g.*, SED Amended Opening Brief at 27 ("Was there more than one breach?"); *see also id.* at 100 ("Comcast *may* also have violated Business & Professions Code §§ 17200 & 17500") (emphasis added).
[290] *See* SED Amended Opening Brief at 91 (citing *Hill v. Nat'l Collegiate Athletic Ass'n,* 7 Cal. 4th 1 (1994)); Comcast Opening Brief at 31-32 and n.154 (same). As explained above (*see* Section IV(B)(2)(f), *supra*), the Presiding Officer need not even reach the merits of this claim because the Commission lacks jurisdiction to assert it—a fact SED does not address in its Opening Brief.
[291] *Hill,* 7 Cal. 4th 1 at 37.

SED's assertions boil down to the proposition that the Release of VoIP listings was, at most, negligent[292]—an assertion that Comcast vigorously disputes. But even if true, as Comcast's Opening Brief demonstrated, "[e]ven negligent conduct that leads to theft of highly personal information … does not 'approach [the] standard' of actionable conduct under the California Constitution and thus does not constitute a violation of [individuals'] right to privacy."[293]

In any event, Comcast had reasonable procedures in place to protect against the disclosure of non-published listings, but experienced an unforeseen problem with its data extraction process in the unique circumstances involving the transition to new account numbers.[294] SED's suggestion that Comcast had no protections in place for use of non-published numbers by "downstream agents" is also incorrect. The evidence conclusively shows that Comcast did have such controls via express provisions in its contracts and that it attempted to ensure that its listings were properly used.[295]

In sum, SED has not met the "'high bar' for establishing an invasion of privacy claim."[296]

2. SED Has Failed to Demonstrate that Comcast Violated Sections 2891 or 2891.1

a. *Comcast did not violate Section 2891's prohibition on disclosure of "demographic information," which expressly excludes information released to directory publishers.*

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[292] *See, e.g.*, SED Amended Opening Brief at 107
[293] *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1063 (N.D. Cal. 2012) (citation omitted); *see also* Comcast Opening Brief at 32 (discussing cases).
[294] *See* Comcast Opening Brief at 39.
[295] Comcast Opening Brief at 38; *See* Section IV(D)(3) [downstream restrictions]
[296] *In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1038 (N.D. Cal. 2014); *see also In re iPhone Application Litig.*, 844 F. Supp. 2d at 1063.

As Comcast explained in its Opening Brief, PU Code Section 2891 prohibits a telephone corporation from disclosing without a residential customer's consent narrowly defined types of confidential subscriber information or "customer proprietary network information" ("CPNI"), including information such as customer's call records, credit or personal information, or "demographic" information.[297]

SED theorizes that the Release of VoIP listings here entailed a violation of 2891 because it involved disclosure of "name[s] attached to a street address," which supposedly "has been held to be 'demographic information.'"[298] SED is unable to cite any authority for the proposition, however. Nor is this surprising. On its face, Section 2891 states that the prohibition on unconsented disclosures of demographic information does *not* apply to information customarily provided by telephone corporations for directories or directory assistance, as well as zip codes.[299] SED's argument is refuted by the plain text of the statute and should be rejected out of hand.

Intervenors' theories of Section 2891 violations are even more clearly misconceived. For example, they contend that the inadvertent release of customers' phone numbers was a violation of Section 2891(a)(1),[300] but overlook that Section 2891(a)(1) prohibits disclosure of the numbers *called by* the residential customer.[301] Needless to say, there is a difference between disclosing an

[297] PU Code § 2891.
[298] SED Amended Opening Brief at 93.
[299] PU Code § 2891(d) ("This section *does not apply* to any of the following: (1) Information provided by residential subscribers for inclusion in the corporation's directory of subscribers. (2) Information customarily provided by the corporation through directory assistance services. 3) Postal ZIP Code information.") (emphasis added; paragraph breaks omitted).
[300] Intervenors Opening Brief at 25.
[301] *See* PU Code § 2891(a)(1) (with some exceptions, prohibiting disclosure of "[t]he subscriber's personal calling patterns, including any listing of the telephone or other access numbers called by the subscriber.") (emphasis added).

individual's telephone number (a fact that is often publicly available) and disclosing that person's "personal calling patterns."

b. *Comcast did not violate Section 2891.1*

Section 2891.1 prohibits a "telephone corporation selling or licensing" residential directory listings from including the "telephone number of any subscriber assigned an unlisted or unpublished access number."[302] SED contends that Comcast Phone committed two separate violations of Section 2891.1: (1) first, by having a "baseline practice" of including the "name, address and telephone number" of non-published listings (properly flagged as such) in the directory listing files it sent to its agent Neustar;[303] and (2) second, even under this "baseline practice," failing to "properly flag the accounts of non-published numbers with their non-published status" in files it sent to Neustar, (i.e. the submission to Neustar of the non-published listings that were inadvertently released due to the Process Error).[304] Neither argument has merit.

i. *Transmission of listings to Neustar.*

As a threshold matter, both of SED's claims appear to be premised on an allegation that Comcast Phone submitted non-published numbers (correctly flagged or not) to Neustar as part of a license or sale of listings. But Comcast did not sell or license non-published listings to Neustar. As Comcast explained in its Opening Brief, Section 2891.1 was intended to restrict a telephone corporation from selling or licensing its customers' non-published listings to *third parties*—in particular, telemarketers.[305] SED and a federal district court have acknowledged that

[302] PU Code § 2891.1(a).
[303] SED refers to Targus (Neustar's predecessor) as well as Neustar. For simplicity, we refer to both as Neustar.
[304] SED Opening Brief at 94.
[305] Comcast Opening Brief at 35-36.

Neustar was Comcast's own *agent*;[306] it was not a publisher or an independent *third party* to whom Comcast sold or licensed the listings.[307] Comcast cannot violate Section 2891.1 by providing listings to itself.

ii. *SED's Allegations Regarding Comcast's Baseline Practice are Inaccurate*

Second, with regard to non-published listings that Comcast properly flagged as non-published in files to Neustar, the evidence demonstrates that non-published *numbers* were not licensed or sold by Neustar (on behalf of Comcast) to third parties. By its terms, Section 2891.1 prohibits only the sale or licensing of non-published "*telephone number*[s] of any subscriber."[308] The record evidence here establishes that Neustar (acting as Comcast's agent) was contractually required to *exclude* non-published listings in files that it sent to licensees.[309] Moreover, Mr. Chudleigh (of Neustar) confirmed that Neustar did not provide any flagged non-published listings to third parties, with the exception of directory assistance provider kgb.[310] With respect to kgb, Neustar *excluded the non-published telephone number* from the non-published listings,

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[306] SED Amended Opening Brief at 94. The FCC and federal courts have also expressly recognized that telephone corporations may use agents to license listings. *See e.g., Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended*, First Report and Order, 16 FCC Rcd 2736, 2747 (FCC rel. 2001); *Mcleodusa Pub. Co.,* Order, 17 FCC Rcd 6151, 6157 (FCC rel. 2002); *LSSI Data Corp. v. Comcast Phone, LLC,* 696 F.3d 1114, 1120-21 (11th Cir. 2012).

[307] Exh. SED-1 (Staff Report), Att. 11 (Directory Listing License and Distribution Agreement).

[308] PU Code § 2891.1 (emphasis added).

[309] *See* Comcast-Neustar Directory Listing Distribution Agreement § 2.3 ("Targus will take steps to ensure that such non-publish DL information is protected and not included in data provided to Licensees") (Exh. SED 5C (Att. T). Ms. Donato also explained that where Comcast directly provided non-published listings to the ILECs, they were required by their interconnection agreements to exclude flagged listings from publication. *See* Exh. Com 104/104C (Donato) at 13; Att. L (Frontier ICA). ILECs received the listings from Comcast via interconnection agreements and did not purchase or license them; as the record shows, Comcast instead paid the ILECs as to the publication of its listings. Exh. 107C (Miller) at 3 (historically, Comcast "submitted their customers [directory listing] information to the local incumbent local exchange carriers . . . and ***paid*** for the privilege of doing so").

[310] Exh. Com 104/104C (Donato) at 14, Att. D (Neustar Declaration); Tr. (Chudleigh) at 296:11- 297:2 (Oct. 2, 2014). .

consistent with Commission and FCC rules.[311] Mr. Chudleigh also confirmed that the provision of flagged non-published listings (without the phone number) is a common industry practice.[312]

SED challenges Comcast's account, however, and relying on two emails from a Comcast employee ("Ms. M") in July 2009, speculates that Comcast sent kgb non-published ***telephone numbers***.[313] But SED has simply misread the documents. The first email relates to Comcast's provision of listings to kgb in its role as *a provider of directory assistance service*—and that Comcast, consistent with the law, planned to redact non-published telephone numbers (replaced with XXX-XXX-XXXX) in files to kgb.[314]

The second email discusses Comcast's possible plan to send directory listings to kgb—acting in a different capacity –as Comcast's *directory listings agent.*[315] Initially, Comcast considered using kgb as its directory listing agent, but as Ms. Donato explained, in November 2009, Comcast decided to use Neustar as its agent[316] instead of kgb.[317] As a result, Comcast did *not* send any non-published listings (or numbers) to kgb for this purpose.[318]

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[311] 47 C.F.R. Section 51.217(c)(3)(iv) ("A LEC shall not provide access to unlisted telephone numbers, or other information that its customer has asked the LEC not to make available, *with the exception* of customer *name and address*"); *see also* D.97-01-042, 1997 Cal. PUC LEXIS 42,*52, Conclusion of Law ¶ 5 (1997) (prohibiting the provision of name or telephone number, but allowing non-published address to be provided to directory publishers for the purpose of distributing listings)

[312] Tr. (Chudleigh) at 300: 11-16 (Oct. 2, 2014).

[313] *See* SED Opening Brief at 60-61.

[314] *See* Exh. SED 6/6C (Christo), Att. P at COMCASTPOST-OII_013686 (noting that the telephone numbers of non-published customers will be replaced with an "XXX-XXXX-XXXX [sic]" so that their numbers are not found in the kgb database "when a customer inquiries for them").

[315] As Ms. M. states in the email, "Comcast will send customer TN… for all customer types (published, non-published…) directly to KGB on a daily basis" so that "Comcast *eliminates the middle man* (ILECs and LSSI)." SED Amended Opening Brief at 61 and Exh. SED 5/5C(Christo), Att. L at COMCASTPOST-OII_001878.

[316] *See* Exh. SED-1 (Staff Report), Att. 11 ("Targus Info Amendment Number Eight").

[317] Exh. Com 104/104C (Donato) at 6, n.7.

[318] As discussed above, even if such listings had been provided to kgb as an agent, provision of non-published data (including the telephone number), to an *agent* would not mean that there had been a license or sale of non-published listings within the meaning of Section 2891.1. Finally, even if Comcast

iii. *SED's Allegations Regarding the License of Non-Published Number Listings Due to the Release Must Fail*

As for SED's second claim as to a Section 2891.1 violation with respect to Comcast's provision of listings that were not properly flagged (i.e., of non-published listings that were distributed due to the Release, this claim also fails for the reasons that Comcast discussed in its Opening Brief. *First*, Section 2891.1 on its face prohibits only a telephone corporation's sale or licensing of *its own* listings including non-published telephone numbers.[319] Here, however, the listings were not those of *Comcast Phone* (the only "telephone corporation" and not the entity which provides service to the end user customers); rather, they were *Comcast IP*'s listings—those of an unregulated VoIP provider.[320] *Second*, under the LIS agreement that governs Comcast Phone's provision of local interconnection service to Comcast IP, neither the provision nor monitoring of the accuracy of non-published listings is part of the interconnection service that Comcast Phone provides.[321] SED's Opening Brief does not address these deficiencies in its Section 2891.1 claim, and its Section 2891.1 claim therefore must be dismissed.

c. *SED and Intervenors' Theories of Alter Ego and Accessory Liability Fail*

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had provided non-published numbers (flagged) to third parties, this would not have violated Section 2891.1 for the additional reasons discussed below.

[319] PU Section 2891.1(a) provides that "*a telephone corporation* selling or licensing lists of residential subscribers shall not include the telephone number of *any subscriber assigned an unlisted or unpublished access number*." (emphasis added). Section 2891.1(h), in turn, defines such a number as one "assigned to a subscriber *by a telephone or telegraph corporation.*…" Thus, reading the two provisions together, the term "any subscriber" in subsection (a) refers to a subscriber of the "telephone corporation" that assigned the numbers at issue. The legislative history further confirms that the provision "would specifically prohibit a telephone corporation which sells lists of ***its*** residential subscribers from including the telephone number of any subscriber with an unpublished or unlisted access number, as defined, without his or her consent, except in specified instances." Comcast Opening Brief, Appendix 5 (Cal. State and Consumer Services Agency, Dept. Consumer Affairs, Enrolled Bill Rep. on Assem. Bill No. 936 (1989-90 Reg. Sess.) June 30, 1989 at 1.)

[320] *See* Comcast Opening Brief at 35.

[321] *See* Comcast Opening Brief at 35.

Perhaps recognizing that Section 2891.1 cannot be applied to the conduct of unregulated VoIP provider Comcast IP, SED and Intervenors invoke theories of alter ego and accessory liability to reach beyond Comcast Phone. These claims fail.

Alter Ego. Attempting to pierce the corporate veil under theories of "alter ego" liability, SED first makes the perfunctory claim that all Comcast entities should be treated as a single "unified entity."[322] SED's theory is meritless and would reinvent fundamental principles of corporate law.

The "alter ego" theory generally requires proof "(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist *and* (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow."[323] "[*B*]*oth* of these requirements must be found to exist before the corporate existence will be disregarded."[324]

Other than acknowledging that these requirements apply before the corporate form can be disregarded, SED makes no serious attempt to demonstrate that they are satisfied here.[325] Rather, SED invites the Presiding Officer to disregard the corporate form based on the unremarkable fact that some of the Comcast entities operate as "subsidiaries" of others[326]—a fact common to corporations across the country that nonetheless retain their distinct corporate existence.[327]

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[322] *See* SED Amended Opening Brief at 85, 88.
[323] *Mesler v. Bragg Mgmt. Co.*, 39 Cal. 3d 290, 300 (1985) (emphasis added; citation omitted).
[324] *Associated Vendors, Inc. v. Oakland Meat Co.*, 210 Cal. App. 2d 825, 836-40 (1962).
[325] *See* SED Amended Opening Brief at 88 (acknowledging requirements and baldly asserting that "[t]he integrated nature of Comcast's operation makes the application of [the alter ego] doctrine appropriate.").
[326] S*ee, e.g*., SED Amended Opening Brief at 85 (noting that Comcast IP is a subsidiary of Comcast Corporation).
[327] *See Walker v. Signal Co., Inc.*, 84 Cal. App. 3d 982, 1001 (1978) ("more is required than solely a parent-subsidiary corporate relationship to create liability of a parent for the actions of its subsidiary."); *N. Natural Gas Co. v. Superior Court*, 64 Cal. App. 3d 983, 991 (1976) ("A parent corporation is not

Equally unavailing is SED's suggestion (relying on testimony of Mr. Christo) that the corporate form should be disregarded because some of Comcast's customer-facing disclosures and promotional materials refer to "Comcast" generically rather than using the full corporate name of the relevant entity.[328] This argument is meritless: That some of Comcast's communications with customers were written and use the simplified name Comcast is not a reason to treat legally distinct corporate entities as one and the same.[329]

Nor is the mere fact that Comcast Phone and Comcast IP "share some employees," including officers, sufficient to establish that there is "such unity of interest and ownership that the separate personalities of the corporation and the individual *no longer exist*."[330] In short, SED and Intervenors have not shown (nor could they) that the Comcast entities are mere "shells" without independent existence.[331] And no "inequitable result" flows from honoring the corporate form—as in cases, wholly unlike the present, involving concealment of the identity of the

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liable on the contract or for the tortious acts of its subsidiary simply because it is a wholly owned subsidiary.").

[328] *See* SED Amended Opening Brief at 86-87 (citations omitted).

[329] For similar reasons, there is no merit to the claim by Intervenors that Comcast failed to maintain an "arm's length" relationship between the relevant entities here because some non-lawyer witnesses were unable to recall what services certain of the various corporate entities provided. *See* Intervenors' Brief at 20-21 (citing testimony of Mr. Munoz). Nor does the fact that these witnesses testified "on behalf of all of the Comcast companies that were parties to this proceeding" prove anything. (*Id.* at 21) (footnote omitted). SED is bringing this proceeding against all of those entities, and the witnesses' testimony demonstrates that there is no liability on the part of any of these entities. That is a far cry from saying that the entities should be treated the same under principles of corporate law.

[330] Nor can it be sufficient to pierce the corporate veil that the same law firm (or attorneys) represent more than one corporate entity. Law firms routinely represent multiple corporate entities in litigation, yet courts nevertheless recognize that these entities remain distinct for purposes of liability. *See Oakland Meat Co.*, 210 Cal. App. 2d at 836-40 (noting that common employees and counsel are "not conclusive," but rather, other factors must be present in order to justify piercing the corporate veil); *Wymore v. Minto*, No. A125476, 2010 WL 3687511, at *3 (Cal. Ct. App. Sept. 22, 2010) (concluding that the fact that two companies "share an attorney in this case … is of little weight, since on all issues (save and except the alter ego matter) their interests in this litigation are aligned and it is doubtless more efficient to use the same lawyer.").

[331] *See Oakland Meat Co*., 210 Cal. App. 2d at 839.

responsible corporate ownership, manipulation of assets and liabilities of corporate entities.[332] SED does not argue otherwise.[333] Finally, there is not a shred of evidence to support the proposition that Comcast exploited the corporate structure of its entities here for the "very purpose" of "defraud[ing] [an] innocent party."[334]

Accessory liability. SED's theory of accessory liability fares no better than its alter ego theory. Indeed, other than quoting PU Code Section 2111, it devotes no more than three sentences of its 120-page brief to this argument.[335] The argument should be rejected.

As Comcast demonstrated in its Opening Brief, there is no basis for holding Comcast IP and other entities "related [to]" Comcast Phone liable under theories of accessory liability.[336] As an initial matter, Section 2111 exposes entities "other than a public utility" to secondary liability for the *illegal conduct of a public utility* whose actions they assist; non-utilities may be held liable for knowingly aiding and abetting a "violation" of the PU Code.[337] But, as explained

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[332] *See id.* at 836-40.
[333] At one point in its brief, SED refers to "theories of vicarious or alter ego liability." SED Amended Opening Brief at 88. It is unclear whether SED intends to invoke the doctrine of vicarious liability or is confusing it with the distinct doctrine of alter ego liability. To the extent it invokes the former, it has never before asserted the theory and does not even attempt to explain how it could apply here. The argument is therefore not properly before the Presiding Officer. *See* D. 04-09-062 *mimeo* at 60-61 (declining to address allegations that were not made in OII). Even if it were, the argument is meritless. Vicarious liability, a theory generally invoked to hold an employer liable for certain acts of its employee, requires a master-servant relationship in which one party exercises substantial control over the other. *See, e.g., Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523, 542 (2000) ("The nature of the control exercised by the parent over the subsidiary necessary to put the subsidiary in an agency relationship with the parent must be over and above that to be expected as an incident of the parent's ownership of the subsidiary and must reflect the parent's *purposeful disregard of the subsidiary's independent corporate existence*") (emphasis added). Here, however, SED makes no allegation that the Comcast entities were in such a relationship or that one held control over the activities of the other. There is therefore no basis for holding any Comcast entity vicariously liable.
[334] *See* Intervenors' Brief at 19 (quoting *Communist Party v. 522 Valencia, Inc*., 35 Cal. App. 4th 980, 994 (1995).
[335] *See* SED Amended Opening Brief at 87.
[336] *See* Comcast Opening Brief at 35-36 n.169.
[337] *See* PU Code § 2111.

above and below, there is no predicate violation by Comcast Phone here. In particular, Comcast Phone did not perform an element of a Section 2891.1 violation—selling or licensing its own customer lists.

Moreover, to hold an entity (*e.g.*, Comcast IP) liable for supposedly aiding and abetting a violation by another party requires proof of actual knowledge of the specific violation that the entity allegedly assisted.[338] SED introduced no evidence showing that Comcast IP made a *conscious or knowing* decision to assist Comcast Phone in releasing non-published numbers. To the contrary, the evidence shows the Release was entirely inadvertent.[339]

In short, SED and Intervenors cannot avoid the limitations on Section 2891.1 (or any other PU Code provisions that are likewise focused on the acts of regulated telephone corporations) by relying on theories of alter ego, vicarious, or accessory liability.

3. SED Has Failed to Demonstrate that Comcast Violated Section 451

SED alleges that Comcast Phone engaged in "unjust and unreasonable" practices in violation of PU Code Section 451 in four separate ways: (1) charging certain end user customers $1.50 for non-published service without actually providing that service; (2) inadvertently releasing those customers' non-published listings to Neustar; (3) allegedly failing to implement adequate "downstream" controls for its directory listings (both published and non-published);

[338] *See* PU Code § 2111 (applying to every non-utility who "*knowingly* … aids or abets any violation of any provision … of this part, … or who procures, aids, or abets any public utility in the violation") (emphasis added); *see also Casey v. U.S. Bank Nat'l Ass'n*, 127 Cal. App. 4th 1138, 1145 (2005) ("California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted" and "requires a defendant to reach *a conscious decision to participate in tortious activity* for the purpose of assisting another in performing a wrongful act") (citation omitted).

[339] *See* Comcast Opening Brief at 11-13 (citing record evidence).

and (4) allegedly failing to adequately disclose to customers information about its non-published service. None of these theories withstands scrutiny.

a. *Section 451 targets acts by "public utilities," and SED has not shown that Comcast Phone (the only regulated public utility) engaged in any of the alleged violations.*

At the outset, all of SED's Section 451 claims should be dismissed because that provision of the PU Code applies only to public utilities.[340] Here, however, SED has not shown (or, in some cases, even alleged) that *Comcast Phone*—the only regulated entity named as a respondent—was the perpetrator of any of the four alleged Section 451 violations. As detailed in Comcast's Opening Brief and above, the unregulated VoIP provider *Comcast IP* charged its customers for non-published VoIP listings; was responsible for validating the accuracy of published/non-published status of such listings; and disclosed information to its customers about its non-published service.[341]

b. *Inadvertent billing for non-published service did not violate Section 451.*

Even if the Commission could assert a Section 451 claim against Comcast Phone or other Comcast entities based on the theories noted above, the evidence shows that none of the Comcast entities violated Section 451 by charging customers for non-published service that was not

[340] Section 451 mandates that all *public utility* charges, services, and rules be just and reasonable. *See* PU Code § 451. Thus, an essential element of a Section 451 violation is a predicate action by a public utility.
[341] *See* Comcast Opening Brief at 37. As we have explained above, two of SED's theories of Section 451 violations (liability for charging end user customers for non-published VoIP service and for allegedly inadequate disclosures to customers) highlight the unbounded nature of SED's jurisdictional argument. These theories are plainly barred by Section 710. *See* Section IV(B), *supra*.

rendered.[342] Under Commission precedent, inadvertent billing errors do not give rise to Section 451 violations.[343]

In *DCOR*, an energy company erroneously billed a customer for *seven years* of service that was never provided. After the company provided only three years' worth of refunds (in accordance with its tariff), the customer filed a complaint with the Commission, alleging that all overcharges collected during the seven years were "unjust and unreasonable" under Section 451. The Commission rejected the argument, explaining that the "instant dispute is about a billing error, and not an unjust and unreasonable rate."[344] Further, the Commission noted, "[t]he plain language of section 451 establishes only a utility's general duty to collect just and reasonable charges for service. The language of the statute is silent regarding billing errors."[345]

Similarly, in *Knell*, a customer complained that a utility violated Section 451 by overcharging him and failing to correct reported billing problems. The Commission rejected the claim, explaining that "[b]illing problems alone are insufficient to find a violation of our rules and regulations."[346] As in this case, it was significant that the service provider corrected the bills and refunded any overcharges when the problem was brought to its attention by the customer.

These cases reflect the commonsense principle that mere billing errors or similar overcharges do not rise to the level of a Section 451 violation. The same result applies here.

The evidence shows that Comcast believed it was providing non-published service to certain customers who requested that service, but due to the Process Error the customers did not

[342] SED appears to allege a violation of all three paragraphs of Section 451—(1) unjust and unreasonable charges, (2) unjust and unreasonable service, and (3) unjust and unreasonable rules. *See* PU Code § 451.
[343] *DCOR, LLC v. S. Cal. Edison Co. (U338E)*, D.13-02-036, *mimeo* at 3; *Knell v. Pacific Bell Tel. Co.*, D. 03-08-025, *mimeo* at 16.
[344] D.13-02-036, *mimeo* at 3.
[345] D.13-02-036, *mimeo* at 3-4.
[346] D.03-08-025, *mimeo* at 16.

actually receive that service.[347] Before Comcast discovered the root cause of the Process Error, it attended to the individual complaints it received from customers who reported that they were not receiving non-published service.[348] And, once Comcast discovered that a systemic error had led to the Release of non-published listings, it promptly implemented a process to refund charges for non-published service that was not provided to *all* Affected Customers,[349] consistent with the terms of its Subscriber Agreement.[350] Thus, under the Commission's precedent, these billing errors do not violate Section 451.

Perhaps aware that its first Section 451 theory is foreclosed by precedent, SED contends that "[t]he gravamen of the violation here is Comcast's failure to even do spot checks" to ensure the amount being billed is for a service being provided.[351] But SED fails to cite any authority (nor is Comcast aware of any) requiring such "spot checks." Indeed, SED's theory cannot be reconciled with *DCOR* and *Knell*—both cases in which spot checks theoretically could have identified billing errors before the customers discovered them and brought them to the attention of the service providers. In short, there is no basis for the proposition that failure to do spot checks of accounting is "unjust and unreasonable."

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[347] This is analytically no different from a situation where a utility mistakenly calculates the amount due on a customer bill due to a billing error.

[348] Exh. Com 106/106(c) (Stephens) at 18 ("it appears that the NASR representatives who were handling these complaints were focused on resolving the problem for the individual customer. And it appears that in most of these cases, the representative took affirmative steps to remove the customer from the relevant directory listings. See Exhibit H – Summary of CR Tickets for Customers Impacted by the Process Error. My sense is that the representatives believed that this corrected the problem by fixing the problem with the publisher.")

[349] Credits were provided to all Affected Customer with current accounts for any Comcast service; former customers were sent letters notifying them that refunds would be provided if they provided their current address to Comcast. Exh. Com 105/105C (Stephens) at 7-10 (discussing remedies and amounts of refunds); *see also* Comcast Opening Brief at 21. As noted in in Section V.C. below , in accordance with California's Unclaimed Property Law, Comcast will deliver to the California State Controller's Office any amounts it was unable to refund to former customers.

[350] Exh. Com 103-103C (Donato), Att. B at Comcast_POSTOII_000805.

[351] SED Amended Opening Brief at 95.

c. *The Release did not violate Section 451's "just and reasonable" service requirement.*

SED makes the conclusory claim that the inadvertent Release of non-published listings constitutes a failure to provide just and reasonable service in violation of Section 451 because Comcast "allow[ed]" the Release to occur and failed to "catch it for two and a half years."[352]

This theory fares no better than SED's other Section 451 theories. Again, Commission precedent dictates that there was no violation here. In *Cox*,[353] the Commission declined to find a Section 451 violation under similar circumstances. There, due to a computer error, Cox had inadvertently provided approximately 11,000 of its subscribers' unlisted telephone numbers to Pacific Bell, which printed and distributed the listings in accordance with the parties' interconnection agreement. It took Cox nearly one year to discover the error; after discovering it, Cox asked Pacific Bell to stop distributing the tainted directories while the parties worked out remediation measures. The parties were unable to come to an agreement, however, and Pacific Bell knowingly resumed distribution of the tainted directories until the Commission enjoined further distribution. The ALJ in that case found that Cox's conduct (in providing the non-published numbers to Pacific Bell) appeared negligent, and stated in a Proposed Decision that Cox appeared to violate Section 2107.[354] The ALJ further found that Pacific Bell appeared to violate Section 2891.1(a) and Section 451 when it knowingly resumed distribution of the tainted directories.[355]

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[352] Unlike the other Section 451 violations, SED does not seek a separate fine for this alleged violation.
[353] *Order Instituting Rulemaking on the Commission's own Motion into Competition for Local Exchange Service; Order Instituting Investigation on the Commission's own Motion into Competition for Local Exchange Service*, Opinion, D.01-11-062, 2001 Cal. PUC LEXIS 1008 (Nov. 29, 2001).
[354] *OIR on the Commission's own Motion into Competition for Local Exchange Service; OII on the Commission's own Motion into Competition for Local Exchange Service.* D.01-11-062, *mimeo* at 17.
[355] *Id.* at 16 and n.12.

The Commission, however, declined to adopt the ALJ's findings of apparent violations of Section 451 and Section 2891.1(a). The Commission held that neither Cox nor Pacific Bell violated Section 451 (or Section 2891.1 for that matter)—even though Pacific Bell intentionally continued to distribute listings that it knew included non-published numbers.[356]

Here, as in *Cox*, Comcast's provision of non-published listings to Neustar for publication in directories was accidental and was caused by a computer systems error that could not be detected for a period of time. Like Cox, upon learning of the Process Error, Comcast directed its distributor Neustar to stop distributing the non-published listings and worked to delete the listings from Ecolisting and other recipients.[357] Comcast, like Cox, also offered additional remedies for customers who contacted the company, including changing customers' phone numbers for free, promotional packages and other additional service credits/monetary remedies.[358]

SED's efforts to distinguish *Cox* miss the mark. For example, SED seeks to downplay the release in *Cox* by characterizing it as "confined to a few thousand paper directories."[359] The Commission's decision, however, makes clear that, by the time Cox informed Pacific Bell of the problem, approximately *100,000* of the tainted directories had already been distributed.[360] SED also paints Cox as a cooperative participant,[361] but Comcast has also been cooperative in this

[356] D.01-11-062, *mimeo* at 28-30 (removing Conclusions of Law related to Pacific Bell's and Cox's apparent violation of Section 451 and Section 2891.1(a)).
[357] While in *Cox*, the two companies made efforts to reclaim phone directories, Comcast discovered the Release at least a year (or more) after distribution of the Frontier phone directories and after they had already been replaced with new books; therefore, the need to reclaim the outdated books is lower and the burden to do so more significant.
[358] Exh. Com 106/106C (Stephens) at 23; *See also* Confidential Appendix 5.
[359] SED Amended Opening Brief at 113.
[360] D.01-11-062, *mimeo* at 4.
[361] SED Amended Opening Brief at 113.

proceeding. The record shows that Comcast voluntarily contacted the Commission approximately one and-a-half months after it first suspected a systemic error and one month after it started to grasp the scope of the problem.[362] It also proactively worked with Neustar to ensure that Neustar immediately stopped distribution of the non-published listings.[363] In *Cox*, by contrast, Cox waited one month after its discovery of the release before seeking a Commission order compelling Pacific Bell to stop its distribution of the phone directories containing the erroneous listings.

To be sure, it took Comcast longer to discover the Process Error than it took Cox to discover its error. But Comcast's conduct was reasonable under the unique circumstances presented here. The Release was the result of a programming error whose impact could not reasonably have been foreseen at the time the mistake was made.[364] And matters were complicated by Comcast's transition (during the 2010-2012 period) from traditional directory listing processes (which did not rely on the POI Table) to distribution to Neustar (which did).[365] Because the processes for identifying the non-published listing status of listings sent to the ILECs under the traditional process vs. listings sent to Neustar (for publication in Ecolisting and Frontier) were different, it was not readily apparent to service representatives receiving calls from customers that there had been a systemic error with the Neustar process.

Nor did Comcast willfully disregard warning signs of the Release. As is explained in Comcast's Opening Brief, from July 2010 (when the Process Error began) to the end of October 2012 (before the Process Error was discovered), Comcast received calls from fewer than 100

[362] Comcast Opening Brief at 9, 11, 17.
[363] Comcast Opening Brief at 17.
[364] *See* Comcast Opening Brief at 11-13; *see also* Section III.A, *supra*.
[365] [Cite]

Affected Customers per year—a minuscule percentage of the approximately 20 million calls to customer care that Comcast receives from California customers on an annual basis.[366] During the same time period, Comcast also opened a small number of trouble tickets for customers impacted by the Process Error—approximately 25 tickets per year[367]—which is also a very small percentage of approximately 50,000 trouble tickets that Comcast opens in California on an annual basis.[368]

Moreover as the testimony and numerous copies of trouble tickets and customer care notes introduced into evidence uniformly demonstrate, while Comcast did hear from some customers who were affected by the Process Error before its discovery in late 2012, Comcast focused at that time on addressing these customers' individual concerns and correcting the status of their listings for print or online directories.[369] Customer service agents responding to isolated complaints during this period attempted in good faith to correct each problem as it arose, but had no reason to discern that a larger, systemic problem underlay these complaints. Simply put, these isolated problems could not reasonably be expected to have raised alarm bells. And, under these unique circumstances, it was not unreasonable that Comcast failed to discover the problem for longer than the nearly one year it took Cox to discover the problem leading to its release.

Unable to identify any "red flags" that should have alerted Comcast to a systemic problem much earlier, SED's Opening Brief resorts to misleading characterizations (and, in some cases, outright distortions) of the evidence—often without any citations to the record.[370] Like the timeline SED attaches as Appendix 1 to its brief (which is not in evidence, is riddled with errors

[366] *See* Comcast Opening Brief at 16*;* Exh. Com 106/106C (Stephens) at 10-11 and Att. A.
[367] Exh. Com 106/106C (Stephens) at 17-18; Tr. Comcast (Stephens) at 543:3-6; 552:5-21 (Oct. 3, 2014).
[368] Tr. Comcast (Stephens) at 561:3-6 (Oct. 3, 2014).
[369] Exh. Com 106/106C (Stephens) at 18.
[370] *See* SED Amended Opening Brief at 44.

and relies on distortions of the evidence), SED allegations in its brief ignore facts in evidence and greatly overstates the number of customer complaints Comcast received from customers who had requested and were paying for non-published service.

The actual evidence shows that Comcast acted reasonably. And that necessarily precludes a finding of "unjust and unreasonable" practices or provision of service in violation of Section 451. Indeed, the facts presented here are far removed from the typical Section 451 cases involving intentional utility conductdesigned for the utility's financial gain at its customers' expense.[371]

d. *Comcast's procedures concerning third parties' "downstream use" of listings did not violate Section 451.*

The title of section IV.C.b.3 of SED's Opening Brief asserts that Comcast's failure to "monitor[] and enforc[] use restrictions with Downstream Companies like kgb, Targus, and LSSi is also a violation [of Section 451]."[372] Curiously, however, the discussion that follows does not reference these or any third-parties' use, or misuse, of Comcast's data. Nor does SED cite Comcast's directory listing agreements themselves, many of which are in the record, and *all* of which expressly restrict third-parties' use of Comcast's data. Indeed, this section of SED's brief does not cite any record evidence whatsoever. Instead, SED cites to several California and FCC decisions that have little, if anything, to do with this case.

[371] *See Utility Consumers' Action Network v. Pacific Bell*, D.01-09-058, *mimeo* at 83(finding that Pacific Bell's conduct was particularly egregious because it concerned the marketing of basic telephone services to captive residential customers, including immigrant and low income customers, and because Pacific Bell had previously been fined for similar conduct).

[372] SED Amended Opening brief at 95 (punctuation in original altered).

i. *Comcast enforces the restrictions in its contracts.*

Before addressing the case law, it is necessary to correct the fundamental misstatement in SED's heading: Comcast has produced in discovery numerous contracts—both with its current and former distribution agents (Neustar and LSSi, respectively), as well as with eligible licensees (directory assistance providers such as kgb, and directory publishers).[373] *All* of these agreements contain restrictions that prohibit licensees from using Comcast-sourced listing information for purposes other than providing directories or DA services.[374] SED's assertion that Comcast imposed no restrictions on "downstream use" is false.

Comcast, moreover, enforced these restrictions. As Mr. Miller testified, Comcast regularly communicated with Neustar (in phone conversations, meetings, and monthly sales reports) about the companies to which directory listings were provided.[375] Additionally, in the first quarter of 2013, Comcast asked Neustar to undertake a "tactical and legal analysis" to confirm that Neustar was licensing the Comcast-sourced listings *only* to eligible licensees in accordance with this contractual provision.[376] That analysis showed that out of all licensing agreements that Neustar has executed for Comcast listings, only *one* was with an entity that was not a directory publisher or directory assistance provider.[377] And in that one case, Neustar immediately deletedthe data upon discovery[378]

[373] Ex. SED-1 (Staff Report), Att. 11; Exh. SED-5/5C (Christo), Att. T, Y; Exh. SED-5/5C (Christo Rebuttal) L.
[374] *See* Exh. Com 107/107C (Miller Rebuttal) at 5-6 (quoting Comcast-Neustar contract; 7 (quoting form distribution agreement used by Neustar); 9 (quoting LSSi contract)).
[375] Tr. (Miller) at 602-04.
[376] Tr. Comcast (Miller)at 602:20-604:9 (Oct 3, 2014).
[377] Tr. Comcast (Miller) at 603-04; Tr. Neustar (Chudleigh) at 276-83.
[378] Tr. Comcast (Miller) at approximately p. 603-604.

Comcast's dealings with LSSi (discussed more fully in Section III.G), are further evidence of the steps Comcast takes to safeguard its customers' data. Comcast's contract with LSSi specifically precluded LSSi from "sell[ing] or licens[ing] [Comcast] DA Listing information to unaffiliated third parties" without Comcast's "prior written consent."[379] Comcast has included such provisions in its contracts and litigated with LSSi over a breach of that provision—because safeguarding its customers' information is a serious matter, and SED's unsupported accusations to the contrary should be rejected.

ii. *SED fails to acknowledge the legal requirements that limit Comcast's ability to restrict third-parties' use of its customers' listing information.*

At the same time, SED fails to acknowledge the legal requirements that significantly constrain Comcast's ability to restrict third-parties' access to, and use of, its customers' data.[380] Mr. Munoz addressed those restrictions in his pre-filed testimony. As he explained, Comcast is required to make customers' directory listing information available to directory publishers, under 47 U.S.C. § 222(e), and to other LECs, pursuant to 47 U.S.C. § 251(b)(3).[381]

Moreover, federal law prevents Comcast from placing restrictions on other LECs' use of this information, which it is *required* to provide (unless, of course, they agree to those restrictions via contract). Importantly, restrictions *may* be imposed on directory publishers' access to subscriber list information under 47 U.S.C. § 222(e), but not so with respect to other LECs' use of listings under Section § 251(b)(3).[382] Thus, in a proceeding before the FCC in 2001, LECs sought the right to "restrict" third-parties' use of subscriber information to the

[379] Exh. Com 107/107C (Miller) at 9 (quoting Comcast-LSSi contract).
[380] *See* SED Amended Opening Brief at 31-42.
[381] Exh. Com 102 (Munoz) at 6-7.
[382] *See* Exh. Com 102/102C (Munoz) at 8 *citing Provision of Directory Listing Information Under Telecommunications Act of 1934* [*sic*], First Report & Order, 16 FCC Rcd. 2736, ¶ 28 (2001).).

purpose "for which the purchase was made"—*i.e.*, to provide DA services.[383] The FCC "declined," explaining that:

> we conclude that section 251(b)(3)'s requirement of nondiscriminatory access to a LEC's DA database does not contemplate continuing veto power by the providing LEC over the uses to which DA information is put. Once carriers or their agents obtain access to the DA database, they may use the information as they wish, as long as they comply with applicable provisions of the Act and our rules. This latitude in the use of DA information includes permitting a carrier's DA agent to use the information as it sees fit.[384]

The FCC reiterated its position in a 2005 order, where it rejected pleas that third-parties were using LEC-provided listings "for purposes other than DA and DA-like services, such as sales solicitation and telemarketing."[385] Refusing to reconsider its 2001 order, the FCC explained that it "agree[d] with the commenters that argue that the Commission should not provide LECs with the authority to impose their own restrictions on the purposes for which competing DA providers may use DA information."[386] Indeed, the FCC noted, "the imposition of such contractual restrictions by the providing LEC is inconsistent with the nondiscriminatory access requirements of section 251(b)(3)."[387]

SED's criticisms of Comcast for "sharing" its customers' listing information completely ignore these legal requirements.

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[383] *Id.*
[384] *See* Exh. Com 102 (Munoz) at 8 (citing *Provision of Directory Listing Information Under Telecommunications Act of 1934* [*sic*], First Report & Order, 16 FCC Rcd. 2736, ¶ 28 (2001).
[385] In re Implementation of the *Telecommunications Act of 1966*, Order on Reconsideration ("2005 Reconsideration Order"), 20 FCC Rcd. 9334, ¶ 6 (2005) (footnote omitted).
[386] 2005 Reconsideration Order ¶ 8.
[387] 2005 Reconsideration Order ¶ 8.

iii. *The cases cited by SED do not establish a Section 451 violation.*

SED's argument is not advanced by the authorities it cites. First, SED cites a 2000 Commission order stating that "[c]arriers may properly impose reasonable restrictions on the manner and purposes for which each of its customers' subscriber listings may be provided or used by other entities."[388] To the extent not trumped by federal law, Comcast does not disagree. And as the foregoing discussion demonstrates, Comcast does what it can to impose downstream restrictions on third-parties' use of its customers' listings.

SED's argument then takes a wrong turn. Citing Mr. Munoz's testimony regarding the FCC decisions discussed above,[389] SED claims that "Comcast appears to argue that this duty is trumped by federal law that requires a carrier to provide its directory listings to publishers in a non-discriminatory manner," and that "the very authorities Comcast cites require that non-published numbers be kept confidential."[390]

SED erroneously claims that the FCC has not "block[ed] the ability of a carrier to audit what downstream users of its carrier lists the publisher or DA provider is actually making [*sic*]."[391] To the contrary, as noted, while providers may restrict directory publisher's use of listings obtained under 47 U.S.C. § 222(e) to directory publishing purposes, similar restrictions *may not* be imposed on other LECs, who obtain listings pursuant to 47 U.S.C. § 251(b)(3).[392]

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[388] SED Amended Opening Brief at 96 (quoting D.00-10-026, Slip. Op. at 10).
[389] *See* Section III.G, *supra*.
[390] SED Amended Opening Brief at 96.
[391] SED Amended Opening Brief at 97 (footnote omitted).
[392] Inexplicably, SED cites a *1993* order that has obviously been superseded by the Telecommunications Act of 1996, which enacted 47 U.S.C. § 251(b)(3).

In sum Comcast has, where permissible, imposed significant downstream restrictions on third-parties' use of its customers' directory listing information. SED cannot state a Section 451 violation on such grounds.

e. *Comcast's disclosures to customers did not violate Section 451.*

Lastly, SED alleges that Comcast violated Section 451 by "fail[ing] to fully and meaningfully disclose the reality of non-published service as well as other means for customers to protect their privacy."[393] The allegation fails at the outset because the Commission is precluded from regulating the terms and conditions of a VoIP services offering. But even if the Commission had authority over the terms of Comcast's XFINITY Voice service Comcast's disclosures fully and adequately describe the services that it offers and provides to its customers—indeed, its disclosures are essentially identical to those of its industry peers—SED's allegations fail.

i. *Comcast fully and fairly describes its non-published service.*

SED claims that Comcast's "disclosure" of its non-published directory service is confusing and contradictory. Not so. Comcast fully explains this service to customers in three places: the Welcome Kit, the Privacy Notice, and the Customer Agreement. Each disclosure is slightly different, in keeping with the context in which it is made. The Welcome Kit—a non-binding service description provided to customers *after* they have signed up for service—includes the following explanation: "Non-published directory service ensures that Comcast will not submit your phone number to the phone book, online directories, or Directory Assistance."[394] Comcast's Privacy Notice states that: "We take reasonable precautions to ensure that non-

[393] SED Amended Opening brief at 49-50.
[394] Exh. Com 103/103C (Donato), Att. A (Comcast Welcome Kit).

published and unlisted numbers are not included in our telephone directories or directory assistance services, but we cannot guarantee that errors will never occur."[395] Finally, Comcast's terms of service—*i.e.*, the "Agreement for Residential Services," which is the binding contract between Comcast and its customers—explains the limits of Comcast's non-publish service offering as follows:

> **f. Directory Listings.** IF WE MAKE AVAILABLE AN OPTION TO LIST YOUR NAME, ADDRESS, AND/OR TELEPHONE NUMBER IN A PUBLISHED DIRECTORY [WHETHER IN PRINT OR ONLINE] OR DIRECTORY ASSISTANCE DATABASE, AND ONE OR MORE OF THE FOLLOWING CONDITIONS OCCURS: (1) YOU REQUEST THAT YOUR NAME, ADDRESS AND/OR PHONE NUMBER BE OMITTED FROM A DIRECTORY OR DIRECTORY ASSISTANCE DATABASE, BUT THAT INFORMATION IS INCLUDED IN EITHER OR BOTH; (2) YOU REQUEST THAT YOUR NAME, ADDRESS AND/OR PHONE NUMBER BE INCLUDED IN A DIRECTORY OR DIRECTORY ASSISTANCE DATABASE, BUT THAT INFORMATION IS OMITTED FROM EITHER OR BOTH; OR (3) THE PUBLISHED OR LISTED INFORMATION FOR YOUR ACCOUNT CONTAINS MATERIAL ERRORS OR OMISSIONS, THEN THE AGGREGATE LIABILITY OF COMCAST AND ITS AFFILIATES, SUPPLIERS OR AGENTS SHALL NOT EXCEED THE MONTHLY CHARGES, IF ANY, WHICH YOU HAVE ACTUALLY PAID TO COMCAST TO LIST, PUBLISH, NOT LIST, OR NOT PUBLISH THE INFORMATION FOR THE AFFECTED PERIOD. YOU SHALL HOLD HARMLESS COMCAST AND ITS AFFILIATES, SUPPLIERS OR AGENTS AGAINST ANY AND ALL CLAIMS FOR DAMAGES CAUSED OR CLAIMED TO HAVE BEEN CAUSED, DIRECTLY OR INDIRECTLY, BY THE ERRORS AND OMISSIONS REFERENCED ABOVE.[396]

SED complains that these disclosures are contradictory because, on the one hand, the Welcome Kit "*ensures*" a non-published number will not be published (which SED misinterprets as an iron-clad guarantee that an inadvertent disclosure will never occur) while, on the other

[395] Exh. Com 103/103C (Donato), Att. B at Comcast_POST-OII_000791.
[396] Exh. Com 103/103C (Donato), Att. B at Comcast_POST-OII_000805 (capitalization in the original).

hand, the Subscriber Agreement and Privacy Notice expressly advise the customer that errors may occur.[397] Indeed, both documents expressly limit Comcast's liability for an inadvertent disclosure.

SED's assertion that Comcast engaged in an unfair "bait and switch" is unfounded. No reasonable person would understand Comcast's statement in the Welcome Kit (especially when considered in conjunction with the full context of the Customer Agreement and Privacy Notice) guaranteed a fail-proof service. Indeed, Mr. Tien, SED's expert witness on customer privacy expectations, conceded as much at the hearing:

> Q.: The question is[:] is it reasonable to expect that a telephone company will never inadvertently disclose a non-published listing?
>
> A.: No.
>
> Q.: Thank you.
>
> A.: Nobody is perfect.[398]

Moreover, there is no basis for SED's apparent supposition that customers would consider the Welcome Kit in isolation, without reviewing the Subscriber Agreement and Privacy Notice. This is especially true since SED acknowledges that customers are given all three documents, the Welcome Kit, Privacy Notice and Subscriber Agreement at the time of service installation.[399] Moreover, the Subscriber Agreement and Privacy Notice are readily accessible on Comcast's website (notwithstanding SED's claims to the contrary).[400] Further, Comcast mails a copy of the Privacy Notice to customers every year.[401]

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[397] SED Amended Opening Brief at 50.
[398] Tr. Exh. SED 4/4C (Tien) at 27.
[399] SED Amended Opening Brief at 51-53 [citing Donato].
[400] Exh. Com 106/106C (Stephens) at 29 ("finding the Privacy Notice on the Comcast webpage only requires two clicks); SED Amended Opening Brief at 58.
[401] Exh. Com (Stephens) at 29.

Confirming what Mr. Tien testified—and any reasonable customer would understand—Comcast's disclosures were consistent with widespread industry practice. Indeed, the undisputed evidence shows that other providers (including AT&T and Verizon, for example) describe their non-published service offerings in virtually identical ways.[402] Similarly, both Verizon and AT&T strictly limit their liability for inadvertent disclosures in Commission approved tariffs.[403]

Beyond the lack of merit to SED's claims of "unjust and unreasonable" practices with respect to customer disclosures, it is striking that SED fails to note one salient fact: Comcast has *not* asserted of the contract that would invoke the limitation-of-liability provisions in its Customer Agreement when providing redress to the Affected Customers—even though it is contractually entitled to do so. All Affected Customers were immediately provided refunds (the remedy provided in the Customer Agreement, quoted above), but that was just the *starting point* for Comcast's discussion with Affected Customers, as Comcast has explained.[404] No customer who contacted Comcast to discuss the Release was told that a refund was the only available remedy. Quite to the contrary, Comcast has provided Affected Customers substantial *additional* compensation.

In sum, there is simply no basis for SED's claims that Comcast's "disclosures" of its non-published service offerings are confusing, unreasonable or violate Section 451.[405]

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[402] *See* Comcast Opening Brief at 19-20; see also Exh. Com 112(Verizon's website discloses: "Non-Published Service: Your name, address, and telephone number are not published in the Verizon Directory White Pages. Your telephone number is not available from Directory Assistance (411)."); Exh. Com 113 at 5 (AT&T's non-published disclosure states similarly: "'Non-Published' numbers are not available in the phone book or through Directory Assistance.")

[403] *See* Comcast Opening Brief at 19, n.92.

[404] *See* Exh. com 106/106C (Stephens) at 7-18, 25-27.

[405] In addition to SED's unfounded criticisms of Comcast's description of its non-published service, SED makes a series of claims about Comcast's other privacy-related disclosures , for example those relating to CPNI and PII, which are equally meritless. Since SED does not claim that such disclosures are violative

4. SED Has Failed to Demonstrate "Additional Violations of Law"

Perhaps recognizing the fundamental flaws in its principal theories of liability (under Sections 2891.1 and 451),[406] SED asserts a scattershot array of four new claimed violations that were never articulated in the OII or the Scoping Memo. SED's Opening Brief for the first time alleges that Comcast violated General Order ("GO") 168, *may* have violated California Business & Professions Code Sections 17200 and 17500, violated only the "spirit" of California's "Shine the Light Law," and violated Commission Rule 1.1.[407] What SED ignores, however, is that the OII prohibits the addition of violations in this manner providing instead that:

> We expect staff to bring *any* newly discovered information *or alleged violations* by Respondents to our attention. Staff may present additional allegations to the ALJ in the *form of a motion to amend the scope of this proceeding*, which shall be supported by a further staff report or declaration supporting the proposed amendments.[408]

The OII's requirement is consistent with Commission precedent, which clearly has held with respect to SED that "[a]dvancing new legal theories in briefs, after submission of the evidentiary record, is improper. Such tactics are not only unfair to defendants, because they do not provide adequate notice and an opportunity to prepare a defense, but they hinder the Commission's ability to ensure full and fair record development, which is necessary to sound decision making."[409]

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of law, Comcast has not included a detailed refutation of SED's other criticisms in the body of its brief. However, such a response is included should the Presiding Officer wish to review it in App. 4.)

[406] Other enumerated theories of liability alleged were set forth in the OII and Scoping Memo and include: PU Code Sections 2891, 2891.1, 451, 2101, 2111, and Articles I and XII of the California Constitution.

[407] *See* SED Amended Opening Brief at 99-105.

[408] OII at 21 (Ordering Para. No. 8)

[409] D. 04-09-062, *mimeo* at 61 (regarding SED's investigation into Cingular Wireless' practice of not allowing "grace period" to try its service).

The most basic principles of fairness and due process dictate that Comcast cannot be held liable (and much less penalized) for engaging in an alleged violation for which it was never charged.[410] Thus, as a threshold matter, all four of these causes of action should be dismissed because each is outside the scope of this proceeding, and SED failed to follow the procedural requirements specified in the OII to amend the scope of the proceeding.

Should the Presiding Officer nonetheless entertain SED's untimely allegations (which he should not), Comcast will explain below that three of the four theories (GO 168, Business & Professions Code Sections 17200/17500 and Shine the Light) fail because they simply are not actionable at the Commission. And the fourth, SED's Rule 1.1 allegations, fail because Comcast voluntarily corrected its misstatements immediately upon learning that they were inaccurate, took steps to confirm the accuracy of its initial statements before making them, and there was no prejudice.

a. *Comcast did not violate General Order 168*

As a threshold matter, SED's claim that Comcast violated "consumer rights" recognized by the Commission's GO 168[411] is a new allegation that was not specifically noticed in either the OII or the Scoping Memo, which the Commission has held is improper and a violation of due process.[412]

Even if the Commission were to consider SED's new theory of liability, it cannot form the basis for finding a violation. The Commission has expressly described GO 168 as having the "same purpose as a statement of legislative intent" and has held that GO 168 shall not create a

[410] *See* D. 04-09-062, *mimeo* at 61 (declining to address arguments not presented in OII).
[411] SED Amended Opening Brief at 99 (alleging that Comcast violated "privacy and disclosure rights provisions of G.O. 168").
[412] D. 04-09-062, *mimeo* at 60-61(declining to address arguments not presented in the OII).

private right of action, or "form the basis for a finding of liability by a court or *the Commission*."[413] Accordingly the Commission cannot find that Comcast has violated GO 168 (or impose penalties related to this claim).[414]

b. *Comcast did not violate Business and Professions Code Sections 17200 & 17500*

For the first time in its Opening Brief, SED contends that Comcast "may … have"[415] violated Business & Professions Code §§ 17200 and 17500.[416] This argument fails for several reasons. *First*, as set forth above, this theory of liability was never alleged in the OII, nor was it referenced in the Scoping Memo; thus it should be dismissed as a matter of law.[417]

Second, the CPUC has no authority to enforce Sections 17200 or 17500. SED itself readily concedes that "[t]he Commission has acknowledged that enforcement of these Code Sections lies primarily with the Attorney General and District Attorney,"[418] and specifically admits that "the Commission does not have standing to sue under section 17200."[419] SED's bald assertion that it has standing to bring a Section 17500 claim is unsupported by any citation.[420] And its assertion that "violations of these sections may be considered by the Commission in determining whether a public utility has violated a Public Utilities Code Section, such as

[413] D.06-03-013, mimeo at 45 (emphasis added; footnote omitted).
[414] In any event, as explained above, there is no evidence that Comcast violated its customers' right to privacy or that its customers did not receive clear/complete information about material terms and conditions for non-published service.
[415] SED Amended Opening Brief at 100. SED later asserts that Comcast "likely" violated Sections 17200 and 17500 (*see id*.), but is unable to allege any actual violation in fact.
[416] *See id.* (conceding that "the Commission does not have standing to sue under section 17200").
[417] *See* nn. 429(?), *supra*.
[418] SED Amended Opening Brief at 100, citing D.06-03-013, *mimeo* at 42.
[419] SED Amended Opening Brief at 100.
[420] *See id.*

§ 451"[421] would lead the Presiding Officer into reversible error. The Commission has expressly rejected SED's interpretation:

> Some parties in their comments have questioned whether the Commission has authority to enforce provisions of the Business and Professions Code, implying that some of the rules proposed in the rulemaking order would be doing just that. As we discuss in much greater depth in the Enforcement section later, ***the Commission clearly does not have such authority***.[422]

The Commission's conclusion that it lacks authority to enforce Sections 17200 and 17500 is undoubtedly correct. The Business & Professions Code spells out who has standing to bring an Unfair Competition Law or False Advertising Law claim. An action under Section 17200 may be brought by the Attorney General, a District Attorney, a County Counsel, a City Prosecutor or a City Attorney.[423] In addition, an action under Section 17200 may be brought by any person "who has suffered injury in fact and has lost money or property as a result of the "unfair competition," in the case of the Unfair Competition Law,[424] or "of a violation of this chapter," in the case of the False Advertising Law.[425] The Commission has not suffered injury in fact here and has not lost any money or property.

Third, there is no basis for SED's assertion that "the standards developed under §§ 17200 and 17500 can be incorporated into the 'just and reasonable' standard of section 451."[426] Section 451 requires that all charges demanded by a public utility shall be "just and reasonable" and that every public utility "shall furnish and maintain such adequate, efficient, just, and reasonable

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[421] *See id.* (footnote omitted).
[422] D.04-05-057, *mimeo* at 56 (discussing inapplicability of Bus & Prof. Code § 17538.9) (emphasis added).
[423] Bus. & Prof. Code §§ 17204, 17206(a).
[424] Bus. & Prof. Code § 17204.
[425] Bus. & Prof. Code § 17535 (second paragraph).
[426] SED Amended Opening Brief at 100.

service…"[427] By contrast, Section 17200 targets "unfair competition" (including false advertising),[428] while Section 17500 addresses knowingly making "untrue or misleading" statements.[429] This has nothing to do with the well-established "just and reasonable" practices standard of Section 451.

Finally, in its perfunctory discussion of these statutes, SED has not even tried to (nor could it) make the case that Comcast actually engaged in unfair competition or made deliberately false statements. To the extent SED's theory is that Comcast's statements regarding non-published service in its Welcome Kit were misleading or fraudulent, there is no evidentiary basis for any such claim. As demonstrated above, Comcast never represented to customers that its procedures were foolproof. To the contrary, it advised them that errors were possible.[430]

c. *Comcast did not violate the "Shine the Light" Laws*

As discussed above, SED's "Shine the Light" Law claim was not alleged in the OII or the Scoping Memo and should be dismissed as a matter of law.[431] It should also be dismissed because (i) the Commission has no jurisdiction to enforce it;[432] and (ii) SED does not argue that Comcast violated any specific provision or term in the law, and SED never points to any authority for the proposition that the law should be part of the penalty analysis in this case.

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[427] PU Code § 451 (first and second paragraphs).
[428] Bus. & Prof. Code § 17200.
[429] Bus. & Prof. Code § 17500.
[430] *See* Comcast Opening Brief at 18 and n. 84 (citing Exh. Com 103/103C (Donato) at Att. A & B).
[431] *See* D.04-09-062, *mimeo* at 61.
[432] *See* Cal. Civ. Code § 1798.84(b)-(c) (explaining that a *customer* may bring a private cause of action for damages); *see also Boorstein v. CBS Interactive, Inc*., 222 Cal. App. 4th 456, 460 (2013) (noting customer must have suffered "a statutory injury to have standing to bring a cause of action under the STL [Shine the Light Law]").

Indeed, SED's claim that, at base, Comcast violated only "the spirit" of the law is reason enough that this claim should be dismissed out of hand.[433]

California's Shine the Light law was enacted to address disclosure by a business of its customers' PII (including information relating to income or purchases) to any third party (including affiliates) for that third party's known *direct-marketing purposes*.[434] Where any such disclosure is made, the business must provide a customer, within 30 days after the customer's request ("Request"), a response identifying the names and addresses of the recipients of the PII and categories of PII that was disclosed. By its express terms, the law solely applies to disclosures used for the recipient's direct-marketing purposes.[435] It also only applies where a customer has made a Request for the identities of anyone who used the information for direct-marketing purposes.[436]

Here, no such disclosures for marketing purposes were made by Comcast[437], and no Requests for the identities of any marketers who received PII were ever made by customers.

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[433] SED Amended Opening Brief at 103-104.

[434] Cal. Civ. Code § 1798.83(a); *Boorstein v. CBS Interactive, Inc*., 222 Cal. App. 4th 456, 460 (2013) (Shine the Light Law "requires businesses that share customers' personal information with third parties for direct marketing to disclose, upon a customer's request, the names and addresses of third parties who have received personal information and the categories of personal information revealed.")

[435] Cal. Civ. Code § 1798.83(b)(1)(C) ("The response to a request pursuant to this section received at one of the designated addresses or numbers shall be provided within 30 days."); *Boorstein* 222 Cal. App. 4th at 462 ("'[A] business's obligation to provide [Shine the Light law] disclosures is triggered only if it (1) discloses a customer's information to third parties for their direct marketing purposes; and (2) a customer makes a request for information.'") ("The response to a request pursuant to this section received at one of the designated addresses or numbers shall be provided within 30 days.")

[436] Cal. Civ. Code § 1798.84(b); *Boorstein* 222 Cal. App. 4th at 463 ("a plaintiff must have made, or attempted to make, a disclosure request in order to have standing under the [Shine the Light law].")

[437] "Direct marketing purposes" are defined to include only:

> the use of personal information to solicit or induce a purchase, rental, lease, or exchange of products, goods, property, or services directly to individuals by means of the mail, telephone, or electronic mail for their personal, family, or household purposes. The sale, rental, exchange, or lease of personal information

SED does not contend otherwise; in fact SED acknowledges that "Comcast may technically satisfy the letter of this law."[438] Indeed, that is presumably why it merely alleges a violation of the "spirit" of the Shine the Light law but even that argument fails, since there was no release for marketing purposes at all here.

d. *SED's Allegations Concerning a Rule 1.1 Violation Are Baseless.*

SED claims that Comcast and its counsel violated Commission Rule 1.1 by providing initial discovery responses that contained two (concededly) incorrect—and subsequently corrected—statements: (i) that Comcast could not automatically search its customer care notes (records) to identify all California Affected Customers who may have complained about the publication of their non-published numbers, and (ii) that the Release did not involve the provision of non-published numbers to any directory assistance provider.[439] SED further alleges that Comcast failed to conduct an adequate investigation, which SED claims would have led counsel to discover the truth earlier than it did; that Comcast "engaged in a series of further artifices and misstatements" to defend the misstatement [re: national directory assistance providers];"[440] and that these misstatements "substantially impeded this Investigation."[441]

> for consideration to businesses is a direct marketing purpose of the business that sells, rents, exchanges, or obtains consideration for the personal information.

Cal. Civ. Code §1798.83(e)(2). Release of personal information to directory publishers, and any subsequent directory database access provided to members of the public looking up names and telephone numbers, are clearly not "direct marketing purposes" with respect to the directory compliers.

[438] SED Amended Brief at 105.

[439] SED Amended Brief at 101.

[440] SED Amended Opening Brief at 101. SED does not identify with any particularity or even discuss the alleged "series of further artifices and misstatements" to which it refers. Comcast assumes SED is referring to the three statements identified in Section II.A.4(b) of SED's Opening Brief. Comcast addresses below the first of these three statements which appears to be the only one that is related in any fashion to the representation about the distribution of the non-published listings to kgb. The other two alleged misstatements are addressed in Section III.G above.

[441] *Id*.

SED's claims are baseless. As explained in detail below, Comcast personnel, and its counsel inside and outside the company, diligently investigated the facts and circumstances surrounding the Release and provided discovery responses to SED based on the best information available at the time the responses were prepared. Consistent with its continuing discovery obligations, Comcast promptly corrected those responses within days of obtaining new, updated information. Those were Comcast's (and counsel's) legal and ethical obligations, and they have been fully satisfied.

Moreover, there was no prejudice to SED which had the relevant information well before the hearing and used it to develop evidence. In circumstances such as this, Commission precedent dictates that there can be no finding of a Rule 1.1 violation.

i. *SED's Rule 1.1 Allegation Should be Dismissed Because It Was Not Raised Previously.*

As is explained above, as a threshold matter the claimed Rule 1.1 violations should be dismissed because they were not previously raised in SED's staff report, the OII, or the Scoping Memo. Consistent with due process principles, Comcast cannot be required to defend itself against these charges without adequate notice and after the evidentiary record has closed.

ii. *Comcast Promptly Informed SED as Soon as New Evidence was Discovered and, Contrary to SED's Allegations, Due Diligence Had Been Conducted Prior to Making Those Statements*

(a) Statement about Customer Record Search Capability.

In discovery responses to SED prior to March 2014, Comcast told SED that it could not electronically search the customer care records of all California customers in its CSG billing database (which is where those records are maintained). However, Comcast did say that *ad hoc* queries could be developed to extract data from the CSG billing database for a reasonable subset

of customers and that that data could be put into a searchable format.[442] Comcast did exactly that at SED's request.[443]

Comcast subsequently learned that archived copies of all the customer care notes were electronically stored with a vendor that had word-search capabilities.[444] As soon as Comcast learned this, it informed SED of this fact and provided SED with access to those records—records that SED used in this proceeding.[445]

The evidence does not show bad faith; it shows that Comcast and its counsel undertook reasonable efforts to verify the accuracy of its original statement regarding Comcast's limited search capacities.[446] The data response at issue was sponsored, in part, by Ms. Stephens, who manages Comcast's Executive Customer relations team for the West Division, and who clearly is familiar with Comcast's system for maintaining customer care records.[447] Ms. Stephens personally investigated the matter and was told that the CSG billing system did not have word search capabilities.[448] She was not told, however, that those records were stored with a vendor that did have that capability.

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[442] *See* Ex. COM 106C Stephens at 29-30 ("in response to SED's request for customer "complaints" relating to other publishing of non-pub numbers, I consulted with CSG about the existing search capabilities within the CSG billing system. I was informed that Comcast does not have the capability to perform word searches across multiple accounts in the CSG billing system. Instead, I [w]as told that ad-hoc queries must be developed to extract relevant data from the system and put such data in a searchable format. Although such an effort is manageable for a reasonable subset of customers (and one Comcast undertook for the SED Staff,) I understood it would have been extremely burdensome to do this data extraction for the many hundreds of thousands of customers and former customers in Comcast's California voice customer base.")

[443] *Id.*

[444] Exh. Com. 106/106C (Stephens) at 30:7-10.

[445] Exh. SED 2/2C (Momoh) at 46:1-31 and Att. GG.

[446] SED Amended Opening Brief at 102 ("an adequate inquiry would have revealed that Comcast could in fact search its customer service notes.")

[447] Exh. SED 2/2C (Momoh), Att. H (reflecting the sponsorship of Ms. Stephens); Exh. Com. 106/106C (Stephens) at 2 (regarding Stephens' job responsibilities).

[448] Exh. Com.106/106C (Stephens) at 29:19-22.

(b) Statement About Release to a Directory Assistance Provider (KGB)

Likewise, SED was promptly informed as soon as Comcast discovered that Neustar had provided listings to kgb during the Release period. Comcast's earlier discovery responses to the contrary were concededly inaccurate and unfortunate, since Comcast later learned that personnel within Comcast (Phil Miller) and at Davis Wright Tremaine (Michael Sloan) had been aware of kgb's receipt of listings from Neustar (although not of the possibility that the listings kgb received may have included non-published numbers linked to the Release). The record evidence demonstrates, however, that that (i) the original response that Comcast provided was the product of a reasonable and diligent investigation; and (ii) that those working on the *investigation* were not aware of (and thus did not withhold) the relevant information; they were simply uninformed.[449]

The original response that Comcast provided was the product of a diligent investigation. As Ms. Donato has explained, she asked Neustar—one of whose "responsibilities [is] to track the entities to which it provides our listings… [and] they did not identify kgb as a recipient."[450] Likewise, when Ms. Donato originally spoke to Mr. Miller about the source of the data kgb used to provide DA service to Comcast customers, Mr. Miller told her that kgb received its Comcast listings from LSSI—a fact that *correctly described the source of kgb's data* at that time.[451] Mr.

[449] Com. Exh. 104/104C (Donato) at 12 ("no one working on the investigation knew that kgb received our data via Neustar and my communications with Neustar and others failed to clarify that fact.")"

[450] Com Exh 104/104C (Donato) at 10-11 (citations omitted). Moreover the fact that Comcast undertook this due diligence was corroborated both by email correspondence with Neustar and by the testimony of Neustar's witness Mr. Chudleigh. *See* Com. Exh 104/104C (Donato)at Att. I (S. Toller Emails with Neustar about Licensees)*;* Att. D (Neustar Declaration).

[451] SED takes issue with this explanation noting that "[t]he problem with this explanation is that Comcast stopped delivering directory listings to LSSi in February 2013, well before April 2014 when SED began asking about the full extent of Comcast's directory listing distribution to Targus, kgb and LSSi." SED Amended Opening Brief at 15. SED however appears to assume that Mr. Miller made this statement to

Miller did not think to tell Ms. Donato that kgb had also once received Comcast listings from Neustar, since that arrangement had not been in place for over a year at that point, and since he was not aware that this was relevant to Ms. Donato's inquiry.[452]

It was not until June 2014, while preparing for Mr. Miller's deposition, that the Comcast personnel and counsel working on this matter learned that there might be another recipient of the non-published listings resulting from the Process Error.[453] Comcast then asked Neustar about the possible existence of a Neustar – kgb contract on June 11, 2014. Neustar confirmed the existence of the contract the next day (June 12, 2014). Comcast promptly informed SED and produced a copy of the Neustar-kgb agreement produced the day after that.[454]

Ms. Donato in 2014 or sometime *after* Comcast stopped distributing listings to LSSi. However there is no indication in the record to support this SED's assumption. The entirety of Mr. Miller's testimony on this point is as follows: "I believe that Ms. Donato also asked me at some point about the source of the Comcast DL data that kgb received. I told her that kgb's source was LSSi. At that time I told her that LSSi was in fact the exclusive source of Comcast's sourced DL data. I did not think to mention that kgb had had an additional source of data in 2011 (Neustar) since I took the inquiry as relating to the current period." Com. Exh.107/107C (Miller) at 13.

[452] *See* Com. Exh.107/107C (Miller) at 13; *see also* Com. Exh 104/104C (Donato) at 11 ("in addition to confirming with Neustar that no Comcast directory listings had been provided to any directory assistance provider, I checked how kgb as our 411/DA provider received Comcast subscriber listing data. I was told that LSSi provided Comcast-DA. This is consistent with information that I had received from Neustar in 2012.")

[453] Exh. Com (Donato) 104/104C at 11 ("It was only in June 2014 during review of documents for production in connection with the deposition of Mr. Miller in this case, that we encountered documents that suggested kgb might have received Comcast's directory listings from Neustar during the time period of the Release.")

[454] As the following chronology confirms, disclosure was immediate and counsel was diligent in its efforts to confirm what happened:

- June 11, 2014, 12:18 PM - email to Neustar from Comcast counsel asks for clarification of the issue and says "*we had thought that Neustar did not send any DA listing on Comcast's behalf* – so we are confused." Exh.Com 104/104C (Donato), Att. K-3 (emphasis added).
- June 12, 2014, 3:51 PM - Neustar confirmed to Comcast counsel via email the existence of Neustar-kgb contract for Comcast DL listings. Exh.Com 104/104C (Donato), Att. K-6.
- June 12, 2014, 7:19 PM - Comcast counsel asked for confirmation via email regarding whether California data was included in what was sent to kgb, the source of the Comcast data, and whether any of the data feeds to kgb still existed. Exh.Com 104/104C (Donato), Att. K-6.
- June 13, 2014, 7:38AM - Neustar confirmed via email that the agreement with kgb for Comcast data was terminated effective Oct. 1, 2011 and that kgb had not received Comcast data since that

After that disclosure, Comcast continued to follow up with Neustar to get more detail about the files that had been provided to kgb[455] and when it appeared that Neustar would not quickly confirm whether Comcast data had been sent to kgb, Mr. Miller was asked to follow up with kgb to confirm the dates it received data from Neustar and the use it made of the data.[456]

Although Comcast was never able to definitively confirm that the listings provided to kgb included the inadvertently released non-published listings, given the time period in which kgb received the listings (July 2010 to end of 2011/beginning of 2012) and the fact that kgb received the listings via Neustar, it is likely that they did. Accordingly, in its July 14, 2014 updated Response to Data Request 5B, Comcast reported that "the incorrect directory listing data resulting from the Process Error appears to also have been provided to a directory assistance provider, kgb."[457]

Thus, there is no basis for SED's claim that "Comcast and its counsel should have known these statements were false." The record, recounted above, clearly shows otherwise. And

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time. The email further confirmed that Neustar was working to figure out what data went to kgb. Exh.Com 104/104C (Donato), Att. K-6.

- June 13, 2014 - Comcast informed SED via phone call of the possibility of release to an additional directory assistance provider and offered a 30-day pause and postponement of the deposition to allow Comcast to fully investigate the matter. Exh. Com 104/104C (Donato) at 12 citing App. C to SED Motion to Quash (confidential).
- June 13-2014-production of kgb contract to SED. Exh. Com 104/104C (Donato) at 11.

[455] *See* Exh. Com 104/104C (Donato) Att. K.

- On June 14, 2014, 10:59 AM – email from Comcast counsel to Neustar seeking confirmation of what information went to kgb in advance of depositions. Exh.Com 104/104C (Donato), Att. K-6.
- July 2, 2014, 4:47 PM – email from Comcast counsel to Neustar asking to set up a conference call to discuss additional details regarding the kgb contract and expressing the need to provide details to the CPUC of what happened. Exh.Com 104/104C (Donato), Att. K-1.

[456] Com Exh 104/104C (Donato) at 12. *See* Com Exh 107/107C (Miller)at Exhibit D (kgb answers email); *but see* Com Exh 104/104C (Donato) at Exhibit D (Neustar Decl. at ¶ 9) (stating that kgb received the files only until October 2011).

[457] Exh. SED 5/5C (Christo), Att. V at 7. (Comcast Response to SED DR 5B), attached. Thus, the allegation in SED's brief that "Service of Ms. Donato's July 18, 2014 prepared testimony *was the first confirmation* that in fact non-published account information also went to kgb" (SED Amended Opening Brief at 12) is not accurate.

equally important, as soon as the true facts were learned, Comcast promptly informed SED — which itself decisively belies any deliberate attempt to withhold information.

iii. *Comcast's Mistaken—and Promptly Corrected—Statements did not "Substantially Impede" the Investigation*

SED's assertions that these subsequently corrected statements "substantially impeded this Investigation" are similarly baseless.[458] SED had a number of opportunities after the correction of these mistaken statements to collect any additional information it might want to seek and the statements were corrected well before any Commission decision in the proceeding.

As explained above, Comcast disclosed its enhanced word search capability on March 25, 2014.[459] Not long after that, Comcast ran the word searches requested by staff and provided requested, relevant samples of customer care notes containing the word search hits.[460] SED also served Comcast with three additional Data Requests (Post-OII DRs 4, 5A and 5B), and took three depositions (in June and August 2014) with that information in hand.[461]

With respect to the additional distribution of non-published listings, as explained above Comcast's counsel strongly encouraged SED to agree to a postponement of the June depositions and a "30 day pause" to allow Comcast's investigate the possible additional disclosure and produce additional documents and information to SED.[462] SED refused Comcast's offer, explaining in a June 16, 2014 email which summarized the parties' discussion of the issue, "We

[458] SED Amended Opening Brief at 101.
[459] Exh. SED 3/3C (Momoh) at Att. GG. In addition to this disclosure, Comcast had run a limited number of word searches at SED's request on a smaller sample of Affected Customers and was in the process of exploring other ways to get customer data to SED. *See* Exh. SED 3/3C (Momoh) Comcast Responses to DR 4-22 and 4-23, Att. G at 29-31 and Exh. Com 105/105C (Stephens), Att. E.
[460] Exh. Com. 106/106C (Stephens) at 10:9-15.
[461] *See e.g.*, May 30, 2014 Response and DR 4, Exh. SED 3/3C (Momoh), Att. G.
[462] Reply Supporting Motion to Quash at 2-3.

declined your offer of a 30 day pause...We recognized that we might not have all the requested documents by the time the scheduled depositions started, and certainly will not have digested them by that time, but we felt it was important to keep moving forward.[463]"

This exchange clearly shows that the possibility of an additional distribution of the non-published lists was brought to SED's attention and that SED made the conscious decision to go forward with the June depositions of Ms. Cardwell and Mr. Miller and with the rest of the proceeding. SED also relied heavily on the delay in disclosure of the kgb distribution as a basis for conducting the deposition of Ms. Donato in August 2014 after the close of discovery. Under these circumstances SED cannot now claim that its investigation was impeded.

iv. *The Mistaken—and Promptly Corrected—Statements Should Not Be Considered a Misrepresentation in Violation of Rule 1.1.*

SED claims that Comcast's "material representations" violated Rule 1.1. SED is incorrect. Commission precedent establishes that violations of Rule 1.1 are not appropriate in situations such as this where a party self-reports a misstatement and takes prompt steps to correct it.

For example, in D.09-01-017, Skynet Communications, Inc. ("Skynet") made a material misstatement to the Commission in its motion to withdraw its application, stating that it did not have any intrastate traffic. However, after a review of data provided by its underlying carrier, Skynet learned that was not the case. Thereafter, Skynet brought its mistake to the Commission's attention in an amended motion for leave to withdraw its application. SED's predecessor (CPSD) argued that Skynet had violated Rule 1.1 by providing false information.

[463] Exh. SED 3/3C (Momoh) at Att. GG. Donato Testimony 21:23; *see* Reply Supporting Motion to Quash, Opposition, Appendix C.

The Commission disagreed stating that: "we decline to adopt [SED's] recommendation that a fine be imposed on Skynet for an alleged Rule 1.1 violation. We believe that Skynet made an honest mistake and promptly amended its pleadings as soon as it became aware that intrastate revenue was, in fact, involved in this matter."[464]

Even in situations where the mistake is not self-reported, the Commission has found that Rule 1.1 violations are not appropriate in situations where remedial steps are taken. In D.10-10-016, in response to a staff request after the mailing of a Proposed Decision granting certain requested capital expenditures, Southern California Edison ("SCE") provided the Commission with additional information regarding certain agreements that it had not provided prior to the issuance of a Proposed Decision ("PD"). Upon review of the additional information, staff discovered several discrepancies that caused it to question whether SCE's initial explanation of its rights and obligations under those agreements should have been more comprehensive.[465] The Assigned Commissioner and Assigned ALJ issued a joint ruling to withdraw the PD in order to determine whether the additional information would have led to a different outcome than recommended in the PD.[466] Nonetheless, no Rule 1.1 violation was found. Specifically, the Commission found that given all of the circumstances, including SCE's recognition of the need for remedial action and its agreement to undertake such action, "we conclude we will not pursue a formal investigation."[467]

[464] *In re Application of Skynet Communications*, D.09-01-017, *mimeo* at 6.
[465] *OIR to Implement the Commission's Procurement Incentive Framework*, D.10-10-016 *mimeo* at 10-11.
[466] D.10-10-016 *mimeo* at 10-11.
[467] D.10-10-016 *mimeo* at 22.

Similarly, in D.08-08-019, SED filed a protest to an Application on the grounds that the Applicant violated Rule 1.1 by misrepresenting facts regarding its officers.[468] Shortly after the protest, Applicants filed an amendment to the Application to explain certain matters that SED found lacking in the original Application.[469] After submission of this amendment, SED filed a motion to withdraw its protest, which the Commission granted.[470] Clearly, the correction of the alleged misrepresentation was sufficient for the Commission to not find that Rule 1.1 had been violated.

These cases (like the present case) are very different from situations where a utility realizes it has made an incorrect material representation to the Commission and then chooses *not* to correct the record (or substantially delays doing so). Also unlike the cases cited above (and this case) are those where the utility simply failed to make a reasonable good faith effort to confirm the accuracy of the statement in the first instance. That is what happened in the single case cited by SED in its brief—D.01-08-019. There, Sprint PCS failed to disclose relevant information regarding NXX codes that it possessed in certain parts of California in connection with its request for numbering resources.[471] Unlike in this proceeding, Sprint PCS *did not* pro-actively correct this failure to disclose information. In fact, the only way that Commission staff learned of this omission was by reading an Affidavit submitted to the U.S. District Court as part of a legal action brought by Sprint PCS against the Commission.[472] On those facts, the Commission found that Sprint had violated Rule 1.1 because it "never brought the nondisclosure

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[468] *See In re Application of Telcentris Communications LLC*, D.08-08-019, *mimeo* at 3-4.

[471] *See* D.01-08-019, *mimeo* at 3.

[472] *See* D.01-08-019, *mimeo* at 5, referring to *Cox Communications PCS, LP vs. California Public Utilities Commission* in U.S. District Court for the Southern District of California; Case No. 00-cv 1364-IEG (ABJ) (emphasis added).

to the Commission's attention" and because, as a result, Commission staff was disadvantaged.[473] The Commission also noted that "[a] carrier should not avoid responsibility for the truthfulness of its representations to the Commission simply by neglecting to verify the completeness of material statements made by its employees or agents before releasing them to staff."[474]

In another very different case from the present (D.13-12-053), the Commission found that Pacific Gas and Electric Company ("PG&E") violated Rule 1.1 by not correcting promptly a material misstatement of fact in a pleading filed with the Commission and by disingenuously characterizing the correction submitted for filing as a routine and non-substantive correction.[475] In that Decision, PG&E failed to timely notify the Commission that the pipeline data it first reported for a particular line was incorrect.[476] The Commission relied on that information to approve PG&E's request to increase the maximum operating pressure of the line. When PG&E did correct the misstatement, approximately eight months after PG&E became aware of the record discrepancies, it did so by filing an Errata, which it submitted right before a holiday weekend. The Commission determined that "[t]he use and timing of the Errata misled the Commission and the public regarding the substantive and material nature of the information."[477] Moreover, the Commission explained that:

> Once PG&E had knowledge of material errors in its filed Supporting Information that the Commission relied upon to set a safety standard in D.11-12-048, PG&E should have brought the record discrepancies to the Commission's attention through an appropriate filing while it investigated the application of its one-class-out policy. By omission, PG&E's failure to promptly make such a filing misled

[473] *See* D.01-08-019, *mimeo* at 16.

[475] *See OIR to Adopt New Safety and Reliability Regulations*, D.13-12-053. *See also* D.14-05-034 (Order Denying Rehearing of D.13-12-053).

[476] D.13-12-053. [add reference to rehearing in first cite]

[477] D.14-05-034, denying rehearing of D.13-12-053, *mimeo* at 2 (emphasis added).

> the Commission by allowing a "false statement of fact," within the meaning of Rule 1.1, to remain uncorrected after PG&E had the knowledge to correct it.[478]

The Commission found that PG&E violated Rule 1.1 "by allowing known errors to persist without correction."[479] Clearly, this is not the case here.

In the instant proceeding, as explained above, Comcast self-reported information to SED on both matters immediately upon learning that its certain prior statements were inaccurate, and made those corrections long before the Commission relied on them in a decision. Likewise, in contrast with the Sprint case cited by SED, Comcast had taken extensive steps to confirm the accuracy of its initial statements.[480]

For the foregoing reasons, SED's claims that Comcast violated Rule 1.1 should be denied. To do otherwise, would not only be inconsistent with Commission precedent, it would have a chilling effect on self-reporting and discourage utilities from bringing mistakes to the Commission's attention.

D. SED CANNOT RELY ON SPECULATION AND UNSUPPORTED ASSERTIONS TO MEET ITS BURDEN OF PROOF

SED acknowledges that it bears the burden of proof in this proceeding.[481] Specifically, it must "show by a preponderance of the evidence that respondents violated California law or regulations."[482] Under that standard, "SED must present more evidence that supports the

[478] D.13-12-053 *mimeo* at 13-14.
[479] D.13-12-053, *mimeo* at 14.
[480] Exh. Com 106/106C (Stephens) at 29:15-30:11.
[481] SED Amended Opening Brief at 89.
[482] D.14-08-033 *mimeo* at 41.

requested result than would support an alternative outcome."[483] Further, this requires proof of *each element* of each claim SED asserts.[484]

Here, that means that (1) the Presiding Officer's findings of fact must be based on evidence in the record;[485] and (2) the Presiding Officer may *not* rely on inferences based on "speculation, conjecture, imagination, or guesswork."[486] For SED to meet its burden of proof as to *any* alleged violations of law, it must prove each element of each cause of action with record evidence—not speculation or conspiracy theory.[487] Further, "[u]nder established California law, … uncorroborated hearsay evidence does not constitute substantial evidence to support an administrative agency's finding of fact."[488]

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[483] D.14-08-033 *mimeo* at 7 (discussing SED's burden of proof).
[484] *See* D.08-08-017 *mimeo* at 56 (complainant must "carry the burden of proof as to these key cause of action elements," and only then does the burden shift to defendant to establish a defense); *see also* Cal. Evid. Code § 500 (party has burden of proof "as to *each fact* the existence or nonexistence of which is essential to the claim for relief") (emphasis added).
[485] I.08-04-032, mimeo at 15-16 (Ordering Para. No. 5).
[486] D.11-06-003, Att. A (D.11-05-049), *mimeo* at 35, n. 27; *cf. People v. Velazquez*, 201 Cal. App. 4th 219, 231 (2012) ("A reasonable inference may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. It must logically flow from other facts established in the action.") (citations and internal quotations omitted).
[487] For this reason, the Presiding Officer should be skeptical of SED's invitation to "draw inferences from what is missing." SED Amended Opening Brief at 90. The examples SED gives vividly illustrate this point. For example, SED suggests that the Presiding Officer should draw some (unspecified) adverse inference from the fact that certain witnesses were unable to testify about the Release. *See id.* As Comcast has explained, however, this is because some personnel employed when the Release and Process Error were discovered are no longer with the company. Exh. Com 103/103C (Donato) at 16. Nor is the lack of audit reports suspicious, as SED suggests. Comcast had no reason to retain an outside auditor, as it took extensive measures to fix the Process Error using a technically skilled in-house team. It would be reversible error to draw any adverse inference from these innocuous facts.
[488] *Utility Reform Network v. PUC*, 223 Cal. App. 4th 945, 949 (2014) (annulling decisions for lack of record evidence).

V. THE PENALTIES RECOMMENDED BY SED AND INTERVENORS ARE UNPRECEDENTED AND CONTRARY TO LAW

SED and the Intervenors bear the burden to demonstrate by a preponderance of the evidence that their proposed penalties are justified.[489] As discussed below, they have fallen far short of meeting their burden. Even if SED and Intervenors could establish violations of the law (and, as shown above, they have not), their proposed penalties—***$43.9 million*** for SED[490] and ***$35.68 million***, with ***additional restitution of $20 million***, for Intervenors[491]—are grossly disproportionate to the alleged offenses, and contrary to PU Code Section 2107, the Commission's precedent, penalty guidelines, and the Constitution. To make matters worse, the parties *also* call for onerous and unnecessary injunctive relief, which goes far beyond the scope of the Commission's authority and would impose millions of dollars in costs.

The Commission should reject these invitations to impose punitive measures for an inadvertent mistake, as they are contrary to law, contrary to the evidence, and contrary to any legitimate policy objective. The Commission should determine that no penalty is warranted.

A. THE RECOMMENDED PENALTIES ARE UNPRECEDENTED.

Combining SED's penalty and the Intervenors' recommended restitution would result in monetary fines totaling at least $63.9 million,[492] not including the many millions of dollars that would be incurred to implement the proposed non-monetary relief. Their proposed penalties, considered individually or in the aggregate, if adopted, would be unprecedented—indeed, it

[489] D.14-01-037 (TracFone), *mimeo* at 15.
[490] SED Amended Opening Brief at 117.
[491] Intervenors Opening Brief at 30-32. The Intervenors support SED's recommendations for additional penalties but do not expressly make those recommendations. *Id*. at 30.
[492] This amount is derived from adding the Intervenors' requested restitution of $20 million to the larger penalty recommendation of SED of $43.9 million. This amount does not include the additional several million that non-monetary remedies such as "online site removal" or payment for security related systems would require.

appears the highest the Commission has ever imposed on any telecommunications company. Although SED acknowledges that the Commission must consider precedent when setting a penalty,[493] it dismisses the most applicable precedent—D.01-11-062 (the *Cox* case)—where *no* penalties were imposed for the publication of non-published listings.[494] Instead, SED points to cases involving demonstrably greater levels of wrongdoing: serious economic harm; egregious and knowing utility conduct; repeat violations; and/or flagrant disregard of Commission requirements.[495] Even in such cases, however, the Commission imposed far lower penalties than what SED and the Intervenors propose here.

SED's attempts to distinguish this case from *Cox* are wholly unpersuasive.[496] As in this case, the *Cox* release was the result of a computer system processing error that led to the inadvertent release of thousands of customers' non-published listings. And, as in this case, the *Cox* release lasted for nearly a year before it was detected. Finally, as Cox and Pacific Bell (the directory publisher for the listings) did in *Cox*, Comcast has expended significant time and

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[493] *See* SED Amended Opening Brief at 106, *see also* D.98-12-075, 1998 Cal. PUC LEXIS 1016 (Dec. 17, 1998), *52-61 (the Commission's guidelines for setting penalties, include review of (i) precedent; (ii) severity of the offense (including whether there was harm to consumers or the regulatory process); (iii) the utility's conduct; (iv) the need for deterrence; and (v) the totality of circumstances in furtherance of the public interest).

[494] It does not even acknowledge D.03-08-025, where the Commission imposed no penalty for AT&T's publication of a customer's non-published number in directory assistance for two months, and on the internet for an "undetermined amount of time." D.03-08-025 (*Knell*), *mimeo* at 15. *See also* D.03-11-027 (Order Denying Rehearing of D.03-08-025).

[495] *See, e.g.,* D. 08-09-038; D.02-10-073; D.01-09-058. Consistent with its bluster, SED even irrationally attempts to equate the inadvertent Release to the gamesmanship reflected in D.08-09-038 when employees of a utility knowingly filed manipulated consumer satisfaction data for seven years. The Intervenors do not even bother to explain why their proposed amounts are consistent with law and precedent.

[496] *See* Section III.F, *supra* (refuting SED's argument that a different result should apply here because Comcast took more than two years to discover the process error, while Cox took nine months to discover its error).

energy to remove the inadvertently released listings and remediate the effects of the Release.[497] Given the obvious similarity between the two situations (and the fact that Comcast acted *more responsibly* here than Pacific Bell in *Cox*), it would be an inexplicable departure from precedent to impose a penalty on Comcast where the Commission declined to impose any penalty in *Cox*. Since no penalty was imposed in the *Cox* case against either Cox or Pacific Bell, notwithstanding Pacific Bell's *intentional* distribution of tainted directories, any imposition of a penalty here would also be grossly unfair (and in light of the proposed amounts), overwhelmingly disproportionate.

Nor is there any basis for reaching a different result because this case involves an online publication. Nothing in this Commission's precedent suggest that higher penalties are due for online disclosures, and SED fails to cite any precedent to the contrary. Indeed, the FCC has expressly *approved* online publishing.[498] Moreover, the Commission declined to impose any penalty for publication of a non-published number in a case where it had been on the internet (in an online directory) "for an undetermined amount of time."[499] Despite SED's claims that data on the internet cannot be contained,[500] the evidence reveals that numbers in a phone book are just as susceptible—if not more so—to public distribution as they may be easily copied page by page.[501] Moreover, despite SED's claims, it was not possible to simply "scrape" (*i.e.*, completely copy

[497] D.01-11-062, *mimeo* at 22; Exh. 103/103C (Donato) at 26-31. The Commission should also consider that Comcast made many process improvements to prevent future errors and engaged an internal audit to thoroughly examine its listing processes, which it is not apparent that the companies did in *Cox*.
[498] *See Provision of Directory Listing Information Under Telecommunications Act of 1934* [*sic*], First Report & Order, 16 FCC Rcd. 2736, ¶ 42 (2001).).
[499] D.03-08-025 (Knell), *mimeo* at 15.
[500] SED Witness Mr. Tien acknowledges this fact, which underscores why SED's recommended non-monetary remedy of online scrubbing would not be effective in any event. *See*, *infra*, at __.
[501] *See, supra*, at III. (Regarding Jane Doe 10)

from the internet) *all* listings that ever appeared on Ecolisting. As the evidence shows, each listing would need to have been searched, pulled up, and copied individually.[502]

SED's rhetoric about "big data" also adds more heat than light. SED all but acknowledges that Comcast violated no rules, regulations or guidelines concerning "big data"—indeed, it invites the Commission to open a new rulemaking on the subject[503]—nor does it propose any fine on this issue.[504] Nevertheless, it raises a parade of horribles about the supposed "predations of the data industry" in order to justify its outsize penalties.[505] As explained above, however,[506] these concerns have nothing to do with this case.

B. THE COMMISSION PRECEDENTS CITED BY SED ARE INAPPOSITE.

While struggling to distinguish *Cox*, SED relies on two Commission decisions that bear only passing similarity to this matter.[507] SED's reasoning makes little sense, as those cases involved serious misconduct (absent here)[508] and the Commission nevertheless imposed *lower* penalties there than SED and Intervenors propose here.

In D.02-10-073, for example, the Commission adopted via a settlement apparently the largest penalty to date against a telecommunications carrier: a $27 million penalty against

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[502] While SED cites to a deposition of Comcast employee Ms. Cardwell as support for its claim, she merely stated that generally, it is possible to take a name, number, and address off the internet today but not that it was possible to download all listings from Ecolisting. Exh. SED-5/5C (Christo), Att. Z, at 159-160. Ms. Donato explained moreover that Ecolisting had also been designed such that its pages were not able to be archived. Exh. 104/104C (Donato) at 15internet.
[503] *See* SED Amended Opening Brief at 2.
[504] SED Amended Opening Brief at 117 (no recommended penalty for "downstream" distribution).
[505] *See* SED Amended Opening Brief at 117. Such over-reaching reflects perhaps SED's belief that the publication of non-published listings, by itself, does not merit the penalties it proposes.
[506] *See* Section III.H, *supra*.
[507] *See* SED Amended Opening Brief at 112-113 citing D.02-10-073 and D.01-09-058. SED also cites an FCC Notice of Apparent Liability, which is neither precedent, nor even an actual FCC finding of liability as an NAL is a preliminary investigation into liability. SED Amending Opening Brief at 113, n.369.
[508] These factors include intentional utility conduct or management involvement, failure to self-report, repeated marketing violations (and to a captive rate base), and/or unjust revenue gains by the utility due to the offense – none of which are present here and were present in SED's cited precedent.

incumbent SBC California, Inc. ("SBC") for cramming (and misreporting) unauthorized charges for internet access services provided by affiliate, ASI, on the bills of approximately 30,000-70,000 customers for two years.[509] Although the case involved a system error, there was considerable evidence that SBC *knew* of the billing errors for at least a year but failed to correct the issue or accurately report complaints on the matter. Moreover, the evidence demonstrated that:

- the Commission's CAB received *863* complaints about these billing errors from 2001-2002, the majority of which it forwarded to either SBC or its affiliate;[510]
- During that same period, SBC filed reports with the Commission that omitted reference to all but a minimal number of these billing complaints; and
- SBC even threatened disconnection to customers of residential service for failure to pay unauthorized charges (in violation of Commission orders).[511]

Here, by contrast, the evidence shows that Comcast had no knowledge of the error. Unlike the SBC case where nearly *900 complaints* from the Commission were forwarded to carrier, here CAB received only *five complaints* concerning publication on non-published numbers prior to October 2012 (the month before Comcast discovered the Process Error).[512] And only one of those complaints was forwarded to Comcast according to SED[513] (but Comcast has no record of such complaint). As discussed above, Comcast also received a small number of complaints—far fewer than the nearly *900* CAB complaints SBC received in D.02-10-073, or the 5,000 complaints SBC received directly from customers over the course of three years[514]—from

[509] *See* D.02-10-073, *mimeo* at 2 (approving settlement).
[510] D.02-10-073, Att. A (Settlement at 7, paras. 39-40).
[511] In addition, SBC was found to have failed to properly credit customers; and to have failed to properly record cramming complaints in violation of the Commission's requirements.
[512] Exh. Com 101/101C (Munoz) at 9, Att. A (SED Confidential Response to Comcast DR Set 2-3).
[513] Exh. Com 101/101C (Munoz), Att. A (SED Confidential Response to Comcast DR 2-3(ii)(3).
[514] D.02-10-073, Att. A (Settlement at 7, para. 41).

customers affected by the Process Error but the relatively small number failed to alerted Comcast that there was a systemic error.[515]

The other case cited by SED (D.01-09-058) also involved very different circumstances from this case. There, the Commission imposed a $25.5 million penalty (ultimately reduced to $15.23 million) on Pacific Bell for aggressive marketing violations, which was not the first time Pacific Bell had engaged in this intentional misconduct.[516] Critical factors justifying the penalty included that: Pacific Bell's management knew or engaged in the marketing abuses; Pacific Bell expected to reap hundreds of millions of dollars of revenue from its abuses;[517] and its ratepayers were "captive" with no competitive options. Pacific Bell's "recidivist" conduct was also a "major aggravating factor" in calculating the penalty.[518] No such aggravating factors are present here: The Release was indisputably an inadvertent error (and did not involve knowing misconduct); Comcast is not a repeat violator; Comcast did not cause the Release as a revenue-generating opportunity nor did Comcast profit from it (and in fact it has incurred substantial expense remediating the Release, implementing enhanced processes, and defending itself in this proceeding), and its actions certainly did not take advantage of a captive rate base.[519]

Finally, a review of recent penalties cases reveals that SED and the Intervenors' proposals here exceed even the penalties imposed for violations involving loss of life or

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[515] *See supra/infra* at ___.
[516] D.02-02-027, *mimeo* at 41, Ordering Par. 3 (recalculating penalties only through the close of the record and not beyond).
[517] D.01-09-058, *mimeo* at 84, n. 33 (noting that Pacific Bell had anticipated, as a result of its marketing practices, "$312.9 million" through increased sales of vertical services and $2 billion in Caller ID revenues).
[518] D.01-09-058, *mimeo* at 103 (Conclusion of Law No. 54). The Commission noted in particular the following practices that violated various provisions of the PU Code: "sequential marketing of optional service packages without disclosure of lower priced plans, misleading attempts to change Caller ID-blocking options, misleading marketing of inside wire repair services, and mandatory sales offers on every call to the detriment of 'offer on every call' customer service." D.01-09-058, *mimeo* at 83.
[519] In fact, the error did not even involve *regulated* services.

considerable economic harm, egregious utility conduct (intentional misrepresentations or disregard of Commission rules, lack of self-reporting, and knowledge at management levels of the transgression), and intentional misconduct (such as cramming or slamming).

Decision	Facts/Violations	Staff or Complainant Proposed Penalty	Commission Adopted Penalty
D.14-01-037 Investigation into TracFone Failure to Collect and Remit Surcharges	**Utility failure to file universal service surcharge reports (and pay related fees) for 12 years and PUC user fees for 8 years** ***Violations:*** *Sections 401-410, 431-435 for failure to pay user fees; failure to pay surcharges under Sections 829, 270, 2881, 275, 276, 280, 281, 739.3*	*"**modest low-range penalty of $500 to $1000/day** per violation (…for most of the relevant time period)" -- between $11.8 and $23.7 million*	***No penalty—*** ***Required only payment of unpaid surcharges of $24.4 million*** *(including interest)* **Mitigating factors:** good faith effort to understand the law with staff; cooperation
D.08-09-038: Investigation into Southern Cal. Edison Performance Based Ratemaking Monitoring and Reports	Utility found to have **manipulation of customer satisfaction data and misreporting of health and safety records for *seven years*** (causing the utility to receive approximately $80 million in ratemaking refunds), which some employees had knowledge of (or encouraged) such misrepresentation.[520] ***Violations:*** *Sections 702, 451, 581, Rule 1.1, CPUC order*	*$102 million*	Commission imposed a daily penalty in the range of *less than **$12,000*** **per violation** (resulting in a **$30 million** penalty). **Mitigating factors:** self-reporting, cooperation with the staff and its own investigation, and corrective measures
D.94-04-057 (rehearing of D.93-05-062) TURN v. Pacific Bell	Improper late payment and reconnection charges on customers in violation of tariff, 7.5 million times. Overcharged customers $34.32 million.	*TURN: $50 million*	***$15 million penalty (based on $2.00 per penalty*** of 7.5 million offenses)

[520] D.08-09-038, *mimeo* at 111 (noting that "SCE's misreporting of health and safety records is closely linked to physical harm," and "the ongoing manipulation of customer satisfaction data caused significant economic harm, as well as harm to the regulatory process").

Decision	Facts/Violations	Staff or Complainant Proposed Penalty	Commission Adopted Penalty
	Managers aware of payment processing problems for at least five years; did not properly notify customers. ***Violations:*** *Section 532* [521]		
D.06-04-035: MCI Investigation into cramming	Slamming and cramming of unauthorized charges ***Violations:*** *Section 2890 (cramming)*	*Not applicable*	Adopted **$2.3 million settlement** ($1 million in refunds to customers and $1.3 million in penalty)
D.02-06-077 Investigation into Telmatch cramming	Cramming customers through "sweepstakes entry forms inducing customers to sign, without recognizing consent to monthly calling card ***Violations:*** *Sections 451, 2890*	*Not applicable*	Penalty of $1.7 million ***($2,000 per 870 distinct offenses)***

The Commission should reject SED's and the Intervenors' proposed penalties as contrary to precedent.

C. THE COMMISSION SHOULD FIND THAT THE RELEASE DID NOT HARM CUSTOMERS OR THE REGULATORY PROCESS.

There is no basis for SED's claims that this case merits a larger than usual penalty because it is supposedly "the first privacy breach that the Commission has confronted in the digital age"[522] and allegedly caused serious harms to consumers and the regulatory process.[523] While Comcast takes extremely seriously the consequences of the Release and does not

[521] D.94-04-057, 1994 Cal. PUC LEXIS 313 (Apr. 20, 1994).
[522] In making this unfounded assertion, SED presumably forgets the *Knell* case, which involved a publication of a non-published number in an online publication—the internet directory Anywho.com.
[523] SED Amended Opening Brief at 106.

minimize the concerns of Affected Customers, SED mischaracterizes both the Release[524] and its impact.

As a threshold matter, whether or not this is the first privacy breach in the digital age is irrelevant to the penalty amount and seems designed more to support SED's calls for some broader Commission review of privacy and big data. With respect to consumer harm, even SED acknowledges that there is no evidence of physical harm to anyone resulting from the Release.[525] To the extent that some customers expressed concerns about the potential impact of the Release on their personal safety,[526] Comcast took extensive measures to provide for appropriate protections—including, for example, paying for security systems.[527]

SED also provides little evidence to support claims of economic harm, admitting that economic damages may be "more difficult to measure."[528] As the Commission has found, economic harm may be measured by the "costs" that customers incur as a result of a violation and the "unlawful benefits gained" by the utility.[529] Here, however, the undisputed evidence shows that Comcast refunded Affected Customers for the amounts they paid for non-published service and provided additional credits and compensation to customers who incurred additional expenses stemming from the Release.[530] Comcast has gained no unlawful benefits from the

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[524] SED's characterization of the Release as a "privacy breach" is more confusing than helpful. A privacy breach typically refers to cases where there has been intrusion or breach in a computer or security system. The Release at issue here was due to an inadvertent flaw in the process for extracting directory listing data.
[525] SED Amended Opening Brief at 111.
[526] SED Amended Opening Brief at 4-5.
[527] Exh. Com 105/105C (Stephens) at 14-16, Atts. F – I; Exh. Com. 106/106C (Stephens) at 27-28.
[528] SED Amended Opening Brief at 108 (the most that SED points to as economic damages are "lost productivity" and "monetary value of the thousands of hours that consumers spent" on the issue.)
[529] D.08-09-038, *mimeo* at 101-102.
[530] Exh. Com 106/106C (Stephens) at 25-27, Att. M (Additional Remedies). Although Comcast sent notification letters to all former Affected Customers, some did not contact Comcast for refunds. *See* Exh. Com 105/105C (Stephens) at 9-10.

Release, as unclaimed funds must be returned to the State,[531] and the revenues associated with the non-published listings (a $1.50 monthly fee) were nominal.[532]

The Commission should also reject SED's unfounded assertions that the Process Error harmed the regulatory process. In considering harm to the regulatory process, the Commission reviews whether specific statutes, decisions, or rules were violated.[533] As explained above, Commission precedent held that VoIP services such as XFINITY Voice are not subject to traditional utility regulation, and the Commission's own staff believed that they could not respond to complaints about the Release due to Section 710's prohibition on VoIP regulation.[534] Even if SED disputes these conclusions, it cannot seriously dispute that—at a minimum—the question of whether the Commission rules and orders even applied to Comcast's XFINITY Voice services was unclear.[535] Accordingly, SED cannot plausibly contend that Comcast acted in flagrant disregard of Commission requirements or law.[536]

Nor is there any merit to SED's accusations that Comcast made material misrepresentations during the investigation, as noted above.

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[531] Cal. Unclaimed Property Law Title 10, Chapter 7, Cal. Code Civ. Proc. §§1530 & 1531. The Commission also cannot adopt Intervenors' and SED's proposal for Comcast to donate the unclaimed amounts to charities or organizations or nonprofit advocacy groups, as it violates law. *Assembly of the State of Cal. v. Public Util. Comm'n*, 12 Cal. 4th 87, 100 (1995) (finding that the Commission's allocation of unclaimed refunds to a telecommunications fund was in violation of Section 453.5's directive that, when the Commission orders rate refunds, such refunds shall be paid "to all current utility customers" and "when practicable, to prior customers," on "an equitable pro rata basis…").

[532] *See* Exh.Com-107C (Miller) at 3 (noting that the revenue was only [**BEGIN CONFIDENTIAL**] [redacted] [**END CONFIDENTIAL**]).

[533] D.08-09-038, *mimeo* at 102.

[534] *See* Comcast Opening Brief at 27-28.

[535] Exh. Com 101/101C (Munoz) at 9, Att. A. Comcast of course maintains that the law was clear—even before Section 710 was enacted.

[536] *See supra* at Section IV.C (finding of violation here would violate due process).

D. COMCAST'S CONDUCT MITIGATES ANY PENALTY

Despite the substantial evidence that Comcast took reasonable steps to prevent, detect, disclose, and rectify the Release (all factors that the Commission reviews for mitigation),[537] SED ignores or distorts these mitigating considerations and inexplicably contends that they should *enhance* any penalty. SED's claims are not grounded in fact or law:

- SED fails to explain why Comcast's safeguards to prevent release of non-published listings—procedures SED itself calls "standard business practices"[538]—were not reasonable procedures to prevent error. To the contrary, the fact that they were standard business practices supports a finding that Comcast's conduct was neither negligent nor reckless, and was in fact reasonable.[539]

- SED's claim that it was unreasonable for Comcast to use a third-party directory listing distribution agent (Neustar), "rather than keep[ing] them in-house" ignores that the FCC and district courts have expressly authorized such arrangements and the fact that Neustar's role (as Comcast's agent) did not lead to the further dissemination of the non-published listings.[540]

- Contrary to SED's claim, Comcast did not take four months to report the Release to the Commission.[541] The record reflects that it was not until mid-November 2012 that Comcast engineers began to suspect that the process for querying the POI Table was flawed, and it was not until late November/early December 2012 that Comcast determined the scope of the Release.[542] Thus it took only *one and one-half months* (during which the major holidays of Thanksgiving, Christmas, and the New Year occurred) after Comcast discovered the Release[543] to fix the

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[537] Exh. Com 103/103C (Donato) at 25-31; *see* SED Brief at 106, citing D.06-04-048 (listing utility efforts to prevent, detect, disclose, and rectify violations as factors for mitigating the need for penalties).
[538] Exh. Com 103/103C (Donato) at 25-26; *see* SED Amended Opening Brief at 110 (disputing that the safeguards were anything more than standard business practices).
[539] Tr. SED (Christo) at 175:1-12 (admitting that what other companies do may be relevant to the standard of care and what is reasonable); *OIR to Revise General Rate Case Plan for Energy Utilities*, OIR.13-11-006, *mimeo* at 7-8 (in considering what are just and reasonable rates, the Commission will consider how to "better facilitate utility revenue requirements showings based on a risk-informed decision-making process that will lead to safe and reliable service levels that are in compliance with state and federal guidelines, rational, well-informed and comparable *to best industry practices.*") (emphasis added).
[540] *LSSI Data Corp*., 785 F. Supp. 2d at 1360.
[541] SED Amended Opening Brief at 111.
[542] Comcast Opening Brief at 15, Exh. Com 103/103C (Donato), at 3, Att. N.
[543] Exh. Com 103/103C (Donato) at 3.

error and remove listings,[544] identify current Affected Customers,[545] implement a notification and refund plan,[546] and voluntarily self-report the Release to the Commission and the AG's Office on January 9, 2013.[547] This amount of time compares favorably to the facts in D.08-09-038, where an electric utility took three months to investigate internally before self-reporting to the Commission its discovery that reports it had filed in rate cases over seven years had been manipulated to the utility's advantage. The Commission lauded the utility's self-reporting (after three months' internal investigation) and cooperation as a mitigating factor for the penalty.[548]

- SED incorrectly argues that Comcast did not have processes to detect the Release. In fact, the record shows that Comcast had methods and procedures for escalating and resolving non-published complaints, which ultimately brought the issue to light.[549]

- SED also argues that Comcast should have performed online site removal for all Affected Customers, but it appears to have missed critical testimony at the hearing that such a process is no longer available on third-party websites.[550]

- Finally, SED cites no authority for the proposition that customer releases with confidentiality clauses are improper. The lack of authority is unsurprising, as this is a common industry practice, and there is nothing improper about it. [551]

In sum, SED's claims that Comcast's conduct aggravates penalties are unfounded. Instead, Comcast's conduct before, during, and after the investigation strongly weigh in favor of mitigation.

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[544] Comcast Opening Brief at 17, Exh. Com 103/103C (Donato) at 15, Atts. D-2, F, G, and H.
[545] Exh. Com 103/103C (Donato) at 17.
[546] Exh. Com 103/103C (Donato) at 17-21.
[547] Exh. Com 101/101C (Munoz) at 6.
[548] *See* D.08-09-038, *mimeo* at 108-109.
[549] As explained above, the fact that Comcast did not detect the Release earlier was not unreasonable. The number of complaints it received associated with the Release were not enough to trigger notice of a system issue.
[550] Tr. Comcast (Stephens) at 533:20– 534:12 ("Many of these sites now – well, all of them that we looked at require that you show some type of proof of identity that you're removing your own information, so that we were no longer able to do that.").
[551] Confidential settlement agreements are entitled to privacy protection given the strong public policy favoring settlements. *See Hinshaw, et al. v. Super. Ct.*, 51 Cal. App. 4th 233 (1996) (noting the privacy of a settlement "is generally understood and accepted in our legal system, which favors settlement and therefore supports attendant needs for confidentiality"); *see also Doe 1 v. Super. Ct.*, 132 Cal. App. 4th 1160, 1171 (2005) (affirming there is no legitimate public interest in disclosing confidential settlement agreements because such agreements serve the interests of the public and the parties).

E. SED'S AND THE INTERVENORS' PROPOSED PENALTIES AND NON-MONETARY RELIEF VIOLATE THE EXCESSIVE FINES AND DUE PROCESS CLAUSES OF THE CONSTITUTION AND PUBLIC POLICY

The fines SED and Intervenors propose would, if adopted, be "grossly disproportionate" to the harm caused by the Release, in violation of the Excessive Fines and Substantive Due Process Clauses of the U.S. Constitution and Art. I, Sec. 17 of the California Constitution.[552] In considering whether a fine is excessive, courts consider the following factors: (1) harm caused by the offense; (2) any other unlawful activity; (3) the gravity of the offense; and (4) other comparable penalties.[553] In light of these considerations, there is no basis for the grossly disproportionate—and, indeed, unprecedented—penalties that SED and the Intervenors have proposed.

As explained above, the record demonstrates that the Release did not harm the regulatory process.[554] The Process Error that caused the Release was an unfortunate but isolated systems failure—and *not* part of pattern or practice of disregarding customer privacy or the Commission's rules. Comcast acted immediately to remediate the harm caused by the Release upon discovery and redress customers' losses.[555] The Commission imposed no penalty in the case most on point (*Cox*), as described above. The proposed penalties exceed those the

[552] U.S. Const., 8th Amendment, and 5th Amendment, and Cal. Const. Art. I, Sec. 17. As the California Supreme Court has noted, the U.S. Const., Eighth Amendment prohibits excessive fines, and the Due Process Clause of the Fourteenth Amendment makes this prohibition applicable to the states. The California Constitution contains a similar prohibition against excessive fines, which is applicable to civil penalties. *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal. 4th 707, 727-28 (2006). *See also U.S. v. Bajakajian*, 524 U.S. 321 (1998).
[553] D.14-05-034, *mimeo* at 15 (footnote omitted)..
[554] *See, supra*, Section V.C.
[555] Exh. Com 103/103C (Donato) at 17-21.

Commission has imposed in cases involving considerably more severe offenses,[556] would violate the Constitutional ban on excessive penalties, and raise serious due process concerns.[557]

Notwithstanding SED's claims to the contrary, Comcast has also demonstrated good faith since it discovered the Release, by timely reporting it to the Commission, promptly compensating Affected Customers, and fully cooperating with the Commission's investigation. As the California Supreme Court has held, "a defendant's good faith or bad faith is relevant to the evaluation of the [excessive nature of the] fine assessed against the defendant."[558]

Finally, the Commission must consider the impact that penalizing Comcast at the levels SED and the Intervenors have proposed might have on utilities' incentive to self-report customer-affecting issues to the Commission in the future. That should weigh significantly in the Commission's analysis, as it did in D.08-09-38, where the Commission recognized that:

> A penalty must take into account the scope of a utility's investigatory efforts, level of self-reporting and cooperation, and corrective measures, *to avoid the unintended consequence of discouraging such* [*cooperative*] *behavior in the future*, for the utility being penalized as well as other utilities.[559]

Comcast respectfully submits that the Commission must take these same considerations into account here. An excessive fine would only serve to discourage future self-reporting of errors and good faith conduct by utilities. In sum, the totality of the circumstances justify no penalty.

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[556] *See, e.g.*, D.14-01-037, D.01-09-058, D.02-10-073.
[557] *See BMW of N. Am. v. Gore,* 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Simon v. San Paolo U.S. Holding Co*., 35 Cal. 4th 1159, 1181-83 (2005).
[558] *Lockyer v. R.J. Reynolds*, 37 Cal. 4th at 731-32 (reversing $14 million fine for further review of disputed facts including defendant good-faith conduct).
[559] D.08-09-038, *mimeo* at 108 (emphasis added).

F. SED'S PROPOSED PENALTY CALCULATIONS ARE FLAWED AND VIOLATE THE LAW.

If a penalty is deemed appropriate, SED's "continuing violation" theory should be rejected. In addition to the mitigating factors, discussed above, the Release should be viewed as a one- or two-violation event, which occurred in late 2009 when Comcast consolidated its California markets and issued new account numbers to its California customers.

SED's proposed penalty amounts for other alleged violations are not only individually excessive because they are grossly disproportionate to the alleged conduct, but should be flatly rejected as impermissibly duplicative and otherwise contrary to law:

- ***SED's proposed penalty for "baseline practice" of providing properly flagged non-published listings to third parties ($5 million) for alleged violation of Section 2891.1*** – As explained above, there is no violation of law. But even if SED could establish a violation, the evidence shows that, to the extent that Neustar submitted Comcast non-published listings to kgb, it did not provide any non-published *telephone numbers*.[560] Moreover, because FCC rules permit the provision of such information to directory assistance providers such as kgb and because Commission has permitted the provision of non-published addresses to third-party publishers and authorized interconnection agreements expressly contemplating the provision of such non-published listings to ILECs (serving as directory publishers),[561] it would violate due process to impose a penalty for such a practice that was consistent with the law.[562]

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[560] As noted above, Comcast provided non-published numbers to Neustar, as its agent. As the federal district court in Georgia recognized, it was entirely appropriate for Comcast to use an agent to act on behalf of itself – and accordingly, the provision of non-published listings to Neustar did not violate any law. *See, supra*, Section III.G.

[561] D.97-01-042, 1997 Cal. PUC LEXIS 42, at *41-42___. The Commission also appears to have approved, via interconnection agreements filed with the Commission, the provision of non-published listings by a CLEC to an ILEC (for directory publishing purposes) as language in interconnection agreements contemplate that the ILEC shall exclude such listings from publication. Exh. Com 104/104C (Donato) at 13, Att. L-26 (Frontier Interconnection Agreement, Att. 2 – Ancillary Services – Section 1.7 – "Carrier grants Frontier full authority to provide Carrier subscriber listings, excluding non-published telephone numbers, to other directory publishers for the sole purpose of publishing directories ….").

[562] *See, supra*, Section IV.C; D.97-01-042. A penalty for this alleged offense would violate the Excessive Fines Clause of the Constitution in that Comcast acted in good faith compliance with what was the apparent law and Commission order.

- ***Proposed penalty for consumer disclosures ($1 million) for alleged violation of Section 451—***As discussed above, SED's allegations that Comcast's end user customer disclosures were unjust and unreasonable are unfounded and exceed the scope of the Commission's jurisdiction. Nor can SED point to any violations of law.

- ***SED's proposed penalty for charging for a non-published listing when Comcast failed to provide non-published listings in alleged violation of Section 451 ($892,000)—*** SED's proposed penalty suggests that Comcast charged customers non-published fees with knowledge that the Release had occurred—which is not true. Moreover, this proposed penalty effectively is impermissibly duplicative of the proposed penalty for the Release (for which SED already has already proposed a $35.68 million penalty). Section 2107 allows the Commission to only impose a penalty that "*has not otherwise been provided*" as to a violation of a rule, commissioner order, or law.[563] The *event* giving rise to the alleged violation of non-published fees for a service that was not delivered is the *Release*, and SED already has proposed a penalty for that.[564] Accordingly, there is no basis for another penalty for the same conduct.

- ***Proposed penalty of $1.294 million for two Rule 1.1 violations***—Even if violations were somehow found, there is no basis for any penalty. Any such statements were inadvertent; there was no harm to the regulatory process; SED was not prejudiced by the later clarifications.

G. THERE IS NO BASIS FOR SED'S AND THE INTERVENORS' PROPOSED NON-MONETARY PENALTIES OR REQUESTED RESTITUTION.

SED and the Intervenors also recommend a variety of other injunctive remedies and relief that the Commission should not—and cannot—impose. First, the Commission has no authority to impose these remedies on Comcast IP and/or as to the VoIP services; all of the proposed non-monetary remedies are therefore barred on that basis. Second, many of the proposed remedies conflict with the law. Third, a number of the remedies are beyond the scope and/or have no

[563] When an administrative agency rule and a statute make the same conduct unlawful, it is improper for an enforcement agency to impose penalties under both the rule and statute. *See Cohan v. Dep't of Alcoholic Beverage Control*, 76 Cal. App. 3d 905, 911 (1978).

[564] It should be noted that Comcast, to the extent it matters for this analysis, put into place a mechanism to refund the amount paid by each Affected Customer for the period of time their non-published phone number was released.

relevance to this proceeding. Finally, to the extent that their proposed non-monetary remedies would impose millions of dollars in costs to implement or maintain, or where requested restitution goes beyond making customers "whole," these proposals are really disguised additional penalties. This further exacerbates the already glaring lack of proportionality between the alleged conduct and the penalties proposed.

The following proposed remedies therefore must be rejected:

- ***Additional consumer disclosures related to VoIP non-published service*** could impose at least $1 million in costs for preparing and mailing notices to all customers and should be rejected as excessive for the reasons explained above. To the extent that the requested disclosures would require statements related to issues such as Do-Not-Call or CPNI, these issues are simply beyond the scope of this case, have no nexus to this matter, and are not required by any Commission order.[565]

- ***Ordering Comcast to cease providing non-published data (even if properly flagged) to any third parties, including agents*** contravenes federal and state law that expressly permits—and indeed requires—the provision of non-published data, and is completely impractical.[566] The only exception that SED recognizes for providing non-published listings is for emergency services; however, SED fails to understand that non-published numbers need to be shared with third parties for a variety of legitimate business purposes including for transporting traffic/long distance providers, billing vendors, vendors who provide customer care, Caller ID requirements, and even (as this Commission has recognized) the provision of directories to customers.[567]

- ***Requiring Comcast to remove the confidential restrictions in the customer releases*** is prohibited by law. It is a well-established principle that the Commission cannot interfere with private contracts or agreements to the extent that they do not relate to regulated matters.[568]

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[565] For the same reasons, the Commission cannot order in-language notice requirements as to any notices.
[566] 47 C.F.R. 64.1601(a)(1), and (b) (requiring telephone number to be passed through in transmission of traffic); D.96-04-049, 1996 Cal. PUC LEXIS 269 at *30 (recognizing the FCC requirement and that non-published customers should be educated about the fact that their number will be disclosed via Caller ID).
[567] D.96-04-049, 1996 Cal. PUC LEXIS 269 at *30.
[568] Cal. Const., Art. I, § 9; and Cal. Const., Art. I, § 7 (A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws… and no law impairing obligation of contracts may be passed). Although the Commission may abrogate contracts between a utility and its customer to the extent that it regulates the rates of that utility (*Colich & Sons v. Pac. Bell*,

- ***Ordering Comcast to make a public statement or announcement of the Release*** s unjustified and contrary to precedent. Most importantly, any public statements would only highlight the possible availability of non-published listings and would alert those with intent to harm a customer that non-published listing data exist in the ecosystem. Similarly, *Cox* recognized that consumers would be further aggravated by additional publicity related to a penalty phase in its case. SED points to Target's announcement of a data breach, but fails to recognize that the instance Release is not a data breach under the law and in any case, the issue there involved stolen credit card and financial information from Target's systems – the announcement of which would not by itself prompt searching of individual customers' information such as the notice that non-published listings had been published.[569] In any event, any Commission order requiring a specific statement or announcement would be an unconstitutional compulsion of speech that violates the First Amendment.[570]

- ***Ordering restitution to customers ($20 million)***[571] is unwarranted as there is no evidence that such restitution would make a customer "whole" or that the proposed amount are losses actually incurred by the customers.[572] The Intervenors point to no evidence that expressly supports their claim that Comcast earned $20 million when it migrated its directory listing distribution model to Ecolisting, or that such benefit equated to the non-published customer's loss of $270 per year. This amount is effectively another penalty and is grossly excessive.[573]

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198 Cal. App. 3d 1225, 1232 (Cal. App. 2d Dist. 1988), the Commission has no such authority over the releases between Comcast IP and its VoIP service customers as they do not pertain to regulated services or their rates.

[569] A data breach is typically referred to where "an individual or group steals sensitive, protected, or confidential data." California Data Breach Report (October 2014) at (i). http://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/2014data_breach_rpt.pdf? Information that is considered sensitive under the data breach law includes a combination of an individual's name or first initial and last name, with a social security number, driver's license, account number, credit or debit number with security code, medical information, or health insurance information (and does not include information such as name, address, phone number). Cal. Civ. Code 1798.82(a), (h). California law requires written notice for data breaches, and allows a company to conspicuously post the notice on its website or to notify major media where the cost of providing notice to customers would exceed $250,000.

[570] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). .

[571] Intervenors Brief at 31.

[572] *See OII. 11-05-028 (restitution ordered to make that consumer whole).* Reparations "are not fines and conceptually should not be included in setting the amount of a fine," as they "are refunds of excessive or discriminatory amounts collected by a public utility, the purpose of which is to "return unlawfully collected funds to the victim." *See* D.02-06-077, *mimeo* at 24-25 (noting that the staff shall submit a "reparation plan for making restitution to customers."). *See also* D.03-06-034 (Order Correcting Error and Denying Rehearing of D.02-06-077).

[573] D.02-06-077, *mimeo* at 25 ("The purpose of a fine is to go beyond victim reparations and to effectively deter further violations by this perpetrator or others").

- ***Payment for home security systems and identity theft protection services for its customers with safety or financial privacy concerns, for three years*** **[estimated costs for *XFINITY Home security systems: several hundreds of thousands of dollars, plus additional costs for identity theft protection service (depending on the number of customers*)]**[574] is prohibited by the Excessive Fines Clause because there is no evidence that all customers with such concerns actually incurred such costs and thus, such requested relief would effectively be a fine (and a poorly tailored one at that), not restitution.

- ***Online Internet Scrubbing*** [***estimated cost for 75,000 customers for 3 years: several million dollars (depending on the number of customers*)**]][575] similarly, there is no basis to require Comcast to pay for "internet scrubbing services" for three years.[576] As SED admitted such services are ineffective. Moreover, even to the extent that such services were effective, internet scrubbing services would not make a customer whole. Instead, they would go beyond what Comcast has offered in its non-published service.

Notwithstanding that the Commission may not *compel* any of the proposed non-monetary remedies, Comcast has, of its own volition, already implemented some of the proposed remedies. In particular, it has implemented a revised and enhanced complaint procedure to ensure escalation and focus on root-cause analysis of non-published complaints; increased customer training; improved internal communications between engineers supporting the billing systems and the directory listing product; commissioned an internal audit reviewing all aspects of its directory listing processes; and performed spot-checks of listings to ensure that no non-published

[574] Identity theft services may cost anywhere from $10-$15/month or more. http://www.costcoidprotect.com/hp01?utm_medium=cpc&mktp=msn&utm_campaign=Brand&utm_term=costcoidentityguard.com&hid=219942443&campid=41&matchtype=b&creative=4534602666. Comcast does not know how many customers may express financial privacy concerns and cannot estimate the amount of such "restitution."

[575] Jane Doe 11 asserts that she spent several hundreds of dollars on an internet scrubbing service. Exh. SED-2/2C (Momoh), Att. P.11, ¶ 7. Even with a conservative estimate of $200 per customer, the estimated cost for such service for one year could be $15 million.

[576] *See* Intervenors Brief at 33.

listings are published (and is continuing such spot-checks).[577] In addition, Comcast continues to consider other process enhancements.

CONCLUSION

Comcast's systems suffered from an unforeseen and unforeseeable flaw, and the Release was an unfortunate result that Comcast deeply regrets and for which it has taken responsibility. But it was not the result of gross negligence or reckless disregard for customer privacy: mistakes can happen, even where a company has done its best to avoid them. And even if hindsight suggests that Comcast could have done better what happened here was not a violation of any law, much less any law over which the Commission has jurisdiction. But even if the Commission could find a basis to assert jurisdiction here—and even if it could find a violation of an applicable law or rule—there should be no liability, and certainly no penalty in the grossly disproportionate, punitive amounts suggested by SED and Intervenors. The case therefore should be dismissed in its entirety. At any rate—and a minimum—the case should be adjudicated fairly and with recognition of Comcast's good faith self-reporting and cooperation, its good faith efforts to protect its customers' data in the first instance and to provide full redress after its discovery of the problem, and the inadvertent nature of the Release.

[577] *See* Comcast Opening Brief at 23-24.

Respectfully submitted this 25th day of November, 2014.

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APPENDIX

Appendix 1- Comparison of Joint Briefing Outline and Comcast Reply Brief Outline

Appendix 2 - Chart of Periods of Receipt of Inadvertently Released Non-Published Listings

Appendix 3 - Tariff of Verizon California, Inc., Rule 10 – Rendering and Payment of Bills (Schedule Cal. P.U.C. No. D&R 3rd Revised Sheet No. 33.3)

Appendix 4 - Response to SED Criticism of Comcast Privacy Notice and Related Policies

(CONFIDENTIAL) Appendix 5- Comparison of Remedies Provided in Cox and Remedies Provided by Comcast

Appendix 6- Comcast Hearing Transcript Errata